The decision undermines the freedom of contract of parties who wish to choose the state law that governs their transactions and creates uncertainty about the enforceability of contractual choice-of-law provisions in this Circuit.

AFS also respectfully submits that the panel majority overlooked facts material to the outcome of these appeals. But the proper resolution of the choice-of-law issue will obviate those factual issues and avoid the conflict with principles of federalism and comity created the majority's decision. On the other hand, if the Court determines that it should address those matters, then AFS requests that rehearing be granted and that the Court certify questions of Maryland law and public policy to the Maryland Court of Appeals.[1]

SUMMARY OF FACTS AND PROCEDURAL HISTORY

As the dissent observes (Dissent at 25), the majority's decision finds or assumes facts against AFS even though the case was decided below on motions to dismiss.

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[1] Certifying questions to the highest state court upon rehearing is permissible. *See, e.g., Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1221-22 (7th Cir. 1993); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327 (5th Cir. 1985). It is especially appropriate where, as here, the panel majority has rested its decision on State law and public policy which the District Court did not address and the parties did not brief in either Court. *See* discussion *infra*.

Lease Auditing and AFS's Audit Contracts

When this litigation began, AFS had six employees and was in the business of providing lease audit services for tenants in commercial buildings, including factory outlet malls. The tenants are typically large retailers or affiliates wholly owned by them, including "Anne Klein Factory Stores, Inc., Corning Revere Factory Stores, Publisher's Warehouse, and Lechter's." Dissent at 25. Appellees Prime Retail, Inc. *et al.* (collectively, "Prime") are owners and managers of such malls throughout the United States, including California, Maryland, and at least sixteen other States.

Typically, the leases between Prime and its tenants obligate the tenants to pay, in addition to base rent, certain operating expenses, known as "common area maintenance" or "CAM" charges. The leases also allow Prime to collect monies for certain "reserves." Under the leases, the tenants are permitted to audit those charges. This is important because of the manner in which tenants are billed for CAM charges and reserves. The mall manager incurs or forecasts hundreds of expenses for the entire facility and "accrues" them into various broad accounting categories. It then divides the total charges in each category among the tenants, usually on a square footage basis, and invoices the tenants accordingly. The tenant seldom, if ever, sees what it is paying for other than in summary statements and similarly conclusory "reconciliation statements" at the end of the year. Absent audits, the tenants cannot be certain that the charges are proper.

In the usual case, audits will reveal various errors and discrepancies and occasionally overly aggressive interpretations of lease terms. But usually each tenant's claims for overcharges at a particular mall during a given audit period are relatively small in amount. Thus, most tenants do not find it economical to conduct their own audits. But AFS, by auditing for several tenants in the same facility and conducting a single audit for the entire facility, makes the right to audit meaningful and practicable for the tenants.

Because overcharges found are usually relatively small, many tenants are unwilling to hire auditors on an hourly basis. Thus, AFS and other companies offer their services for compensation contingent on the amount actually recovered. And because the compensation is contingent on actual recovery, and not merely on the preparation of a report, the auditor commonly takes an assignment of the tenants' claims for any overcharges discovered. The assignments are also attractive to the tenants because they are in ongoing business relationships with their landlords. If suit should be necessary to collect overcharges, the tenant may prefer that the suit not be prosecuted in its name or by it directly, but rather by AFS. Further, AFS bears all expenses incurred in any litigation it commences – putting its own money where its audit report is.

Because the tenant's relationship with its landlord is frequently critical to the tenant's business, most audit contracts allow the tenant to terminate the audit engagement before it is completed. It may do so by paying a "cancellation fee," usually stated in the contract as a percentage of the "discrepancy" demonstrated by the audit, but in practice, a smaller amount is typically

negotiated at the time of the termination. (A tenant terminating the contract need not accept the overcharges or their magnitude as reported by AFS.) "Cancellation fees" tend to approximate reimbursement for AFS' expenses and some measure of *quantum meruit* for AFS' efforts, rather than the kind of fee which the panel majority (at 12) felt created a "Hobson's Choice" for the tenants.[2]

The Present Law Suit

In 1997, AFS conducted two audits of malls owned then or now owned by Prime. AFS discovered improper charges and reserve assessments which could not be explained as mere errors or even aggressive billing practices. AFS discovered regular and repeated efforts to conceal from the tenants the true nature of the charges they had paid. The evidence strongly suggested intentional schemes perpetrated over a period of at least four years and involving multiple victims which had lost collectively

[2] If this case had proceeded beyond motions to dismiss, AFS would have shown that the use of an intermediary to conduct audits and pursue recoveries is crucial to tenants who, in some commercial real estate markets, need to stay in the good graces of their landlords. Absent such intermediaries, the tenants do face a Hobson's Choice – between ensuring they are charged properly for expenses under their leases versus running the risk of losing the leases. For example, while AFS may be pressing a landlord on overcharges, the tenant may be starting negotiations for a new lease and, therefore, decide that the discrepancies found in AFS' audit should not be pursued, to avoid adversity, even indirectly, with the landlord at that delicate time. Alternatively, the tenant may be able to "wrap" the overcharges found by AFS into the economics of the new lease. In this fashion, AFS's audit contracts afford the tenants maximum flexibility, while still allowing AFS to perform a needed service and to be compensated fairly for that service.

tens of millions of dollars. It appeared that the pattern of fraudulent activity was part of Prime's routine business practices. Furthermore, when AFS' audit began to uncover the scheme, Prime acted surreptitiously to end the audit before it could be completed. This litigation ensued.

The District Court's Decision

Prime moved to dismiss AFS' action on various and alternative grounds. These included AFS' lack of real-party-in-interest status under Fed. R. Civ. P. 17(a) and lack of standing. While AFS believed (and still believes) that the original assignments in the audit contracts were legally effective, in response to the defense motion AFS secured from its audit clients a ratification of the assignments and of the filing of the suit. Each ratification stated:

> Company [*i.e.*, tenant] hereby confirms that it has conveyed to AFS title to the claims, in order to allow AFS to prosecute same solely in AFS's own name – without the Company joining in the Litigation or otherwise acting to recover on such claims – and without any expense or liability whatsoever on the Company's part. If and to the extent necessary to effectuate the Company's purpose in assigning to AFS the Assigned Claims, the Company hereby ratifies and consents to AFS' assertion and continued prosecution of those Assigned Claims in AFS' name, in accordance with the terms of the assignments. The Company also acknowledged that it is bound to the rules of procedure and discovery which govern the Litigation and that the Company is and will be bound to the final outcome and adjudication of the Assigned Claims.

While the District Court acknowledged that the Assignments and Ratification sufficed to make AFS the owner and real party in interest of the Assigned Claims, it nonetheless dismissed the claims on the grounds that the assignments were "champertous" under California law and constituted "witness contingency fee agreements." Therefore, the court held that AFS had no standing to prosecute the claims. AFS appealed.

This Court's Panel Decision

California has never recognized the interrelated doctrines of maintenance, champerty, barratry or their variations and has steadfastly refused to make them part of California law or public policy. *See, e.g.*, *Abbott Ford Inc. v. Superior Court*, 741 P.2d 124, 141 n.26, 885 (1987). Tacitly recognizing this, the panel majority applied Maryland law instead. To do so, it had to first overcome the choice-of-law clauses in the audit contracts in question here, which selected California law to govern the contracts. As explained below, the majority applied Maryland law by misapplying established Maryland choice-of-law principles, which embrace § 187 of the Restatement (Second) of Conflicts.

The majority then ruled that while Maryland too has determined that maintenance and its cousins are obsolete, it has "reserved" a generalized prohibition against "officious meddling" to cause others to assert claims "which they have no right to make." Op. at 13. The majority points to a 1908 Maryland criminal statute, Md. Code Ann. § 10-605(a), which it says codified the Maryland common law against certain forms of barratry, and though that statute, on its face, does not apply to AFS' audit

contracts (and the majority does not hold that it does), still the panel found that the statute reflects a general adherence in Maryland to barratry:

> [T]hrough surviving common law principles and statutory prohibition, the current fundamental public policy of Maryland prohibits schemes to stir up and promote litigation for the benefit of the promoter rather than for the benefit of the real party in interest. Any contract violating this policy is void in Maryland and will not be enforced by its courts.

Op. at 14.

Before turning to the grounds AFS believes warrant rehearing in this case, it is useful to take a closer look at the contracts in question and some important facts which the majority overlooked.

A Closer Look at the Contracts and the Majority's Reasoning

Because AFS cannot earn compensation unless it finds overcharges in the first place, its incentive to find overcharges and, according to the majority, to "trump up" claims and "stir up" litigation arises not with the assignments of the tenant's claims but with the audit itself. Indeed, the mischief which the majority condemns is theoretically possible even if AFS took no assignment of the tenants' claims but was compensated contingently from what the tenant recovered from the landlord. Although subtle, the inescapable point of the majority holding is that forensic accounting for a contingency fee is barratry and contrary to fundamental public policy. Yet, even if AFS were held to the standards of a certified public

accounting firm, its mode of business would be proper. Since 1990, as a result of action by the FTC, the standards of the AICPA have expressly recognized the propriety of doing forensic audits for a contingency fee. *See,* AFS's Supplemental Brief (11/16/01) at 7-9 and Standards there discussed, excerpted in Supp. App. 23-42. No Maryland statute, professional rule, case or other authority is to the contrary.

With respect to the assignment of claims, the dissent underscores the majority's evident assumption that AFS' contracts with its tenants are part of a scheme to propagate not only litigation but spurious litigation:

> [Under the audit contracts], [l]itigation is available as a last resort, and AFS has had to pursue litigation in relatively few cases. AFS's president, Mark S. Malen, confirms this in his *unrefuted* affidavit [reporting] that litigation has been required in less than 10% of the engagements for which we have been retained.

Dissent at 23-24 (emphasis in original). The majority not only overlooks those facts, it assumes contrary facts. But indeed the assignment of claims to AFS actually works against "trumped up" audits when they are performed for a contingent fee. Once AFS reports an overcharge to a client, it must pursue the recovery at its own expense unless the client cancels the engagement. As the dissent notes, "because AFS must bear the expenses of any unsuccessful litigation, it is unlikely that it would waste its resources on a pointless lawsuit." *Id.* at 25. AFS has no more incentive to report to a client groundless audit results, when doing so can accomplish little but to embroil AFS in an expensive and fruitless collection effort, than

does the auditor working for an hourly fee with no control over any litigation.

Also, AFS's audit contracts must be contrasted to the arrangement which the majority (at 14-15) espouses – that is, where "the tenants retain the right to prosecute [their claims] with the assistance of AFS[,]" while AFS provides "consulting services within its expertise" and is compensated by a percentage of what the tenant, rather than AFS, recovers. Op. at 15; *see also*, Op. at 8 n.2 and 12 n.4. Under this conception, the contingent fee auditor would have the same incentive to find discrepancies but would be undaunted by the cost to litigate them.

This leads to the majority's finding that the decision to sue is made by AFS unfettered by the tenant's judgment (except for the cancellation right) and is made solely for AFS' benefit. Those findings overlook the facts: (i) that in this case the tenants *did* exercise their judgment that the assigned claims should be pursued *after* the audit and indeed *after* AFS commenced suit, as they ratified the assignments in the District Court; (ii) that the cancellation right is not the Hobson's Choice the majority fears and was, in any event, bargained for by sophisticated business people hardly in need of special protections of the courts; and (iii) that the tenants receive between 50% and 60% of the net amount recovered on the assigned claims without incurring any litigation expense, inconveniences or risk whatsoever – hardly a "scheme[ ] to promote litigation for the benefit of [AFS] *rather than for the benefit of the [tenant] or the public.*" Op. at 14 (emphasis added). And unless one assumes that AFS is acting in bad faith, the majority overlooks the benefit to the tenants and to the public in ferreting out overreaching and fraud and preventing their repetition.

REASONS FOR GRANTING REHEARING OR REHEARING *EN BANC*

I. THE PANEL MAJORITY'S CHOICE OF LAW ANALYSIS VITIATES RESTATEMENT § 187

Neither side raised an issue on appeal as to whether Maryland law would oust California law, the law chosen by AFS and its clients to govern their contracts. Nevertheless, the majority ruled that the contractual choice of law could not apply.

A. Background on Choice of Law Problems

"Choice of law today, both the theory and practice of it, is universally said to be a disaster." William L. Reynolds, *The Silver Anniversary of the Second Conflicts Restatement: Legal Process and Choice of Law*, 56 Md. L. Rev. 1371 (1997). Critics have assailed the Restatement, and in particular § 187: "[T]he rule of section 187(2) has generated a raft of judicial decisions marked by confusion, temerity, and vacillation." Kirt O'Neil, Note, *Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 Tex. L. Rev. 1019, 1020 (1993). This Court has described the "fundamental policy" element of § 187 – the one on which the majority based its decision – as the "most vexing element of the *Restatement (Second)* formulation." *Barnes Group, Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1030 (4th Cir. 1983).

While Restatement § 187 may be imperfect, it is nevertheless the test that prevails among the States in this Circuit. *See, e.g., Torres v. McClain*, 535 S.E.2d 623, 625 (N.C. Ct. App. 2000); *Behr v. Behr*, 266 S.E.2d 393, 395 (N.C. Ct. App. 1980); *Lee v. Saliga*, 373 S.E.2d 345, 350

(W. Va. 1988); *Malpractice Research, Inc. v. Norman*, 24 Va. Cir. 118, 119-20 (1991); *Nat'l Glass, Inc. v. J.C. Penney Props., Inc.*, 650 A.2d 246, 248 (Md. 1994). This case presents an opportunity for the Court to clarify some of the ambiguities that hamper § 187 analyses, including those wrought by the panel majority's published opinion in this case.

B. The Majority Disregarded Two of the Three Elements of Restatement § 187.

As explained by the dissent, under § 187(2)(b):

> Three conditions must therefore be met before Maryland would reject California law on the ground that Maryland public policy is implicated. First, Maryland law must apply in the absence of an effective choice of law provision. Second, the California law must be contrary to a fundamental (or strong) public policy of Maryland. Third, Maryland must have a materially greater interest than California in the outcome of the particular issue, here, whether the assignments are legal.

Dissent at 19. Likewise, this Court has previously held that "Subsection (b) [of Section 187(2)] has *three requirements*" – the same three articulated in the dissent in this case. *Broadway & Seymour, Inc. v. Wyatt*, 944 F.2d 900 (unpublished table decision), 1991 U.S. App. Lexis 33801, *9 (4th Cir. Sept. 13, 1991).

The majority in this case, however, considered the "fundamental policy" element of Section 187 – and "never addresses the first and third conditions even though all three must be met under the Restatement rule adopted by

Maryland." (Op. at 19; Michael, J., dissenting). Not only is the majority's decision in conflict with other decisions in this Circuit, in Maryland and other states in the Circuit, its departure from established precedent here was outcome determinative.

If the majority had applied the first requirement of § 187(2)(b) – that Maryland law would apply in the absence of the choice of law provision – it would have had no basis for finding the requirement satisfied. AFS is based in California and its clients are headquartered throughout the United States, but none in Maryland. None of the audit contracts was made in Maryland. See Op. at 19-20.

The second requirement is that there be a "*strong* public policy against the enforcement of the foreign law in Maryland" (Op. at 20), something more than a difference in law. According to Maryland precedent and the dissent here:

> '[M]erely because Maryland law is dissimilar to the law of another jurisdiction does not render the latter contrary to Maryland public policy.' . . . [A]s far back as 1868 the Court of Appeals of Maryland noted that 'the common law notion of maintenance, as applicable to the assignments of rights of action, had become practically obsolete.' . . . Accordingly, no strong public policy against the California law allowing the assignments in this case can be gleaned from whatever, if anything, might remain of the common law doctrines of maintenance, champerty, and barratry in Maryland.

Op. at 20-21 (citations omitted). Maryland courts have not remotely evinced the strength of public policy against

"barratry" necessary to invalidate contracts valid in the place they were made.

Finally, on the third requirement, "it is evident that California has a materially greater interest in the outcome of this case than Maryland." Op. at 23. And as is true for the first prong of § 187(2)(b), the majority offers no analysis countering that conclusion.

In short, the majority's decision conflicts with the law upon which it purports to rely and with the decisions of this and other courts applying that law. And it invades the freedom of parties to contract and casts doubt on the efficacy of choice-of-law provisions they may put in their contracts – matters of exceptional importance warranting reconsideration of the majority's decision.

II. THE PANEL MAJORITY'S DECISION RAISES SERIOUS ISSUES OF FEDERALISM

Even if Restatement § 187 dictated the application of Maryland law, the majority's opinion should not be allowed to stand because it intrudes on Maryland's policy-making province. The Supreme Court has emphasized that articulating public policy is, absent congressional action, left by the Constitution to the States' legislatures. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 691-92. It is not to be determined *ad hoc* by judges, no matter how well-meaning. *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 138 (1960), *reh'g denied*, 393 U.S. 1045 (1969) ("public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives"). In *L&E Corp. v. Days Inns of America*, 992 F.2d 55

(4th Cir. 1993), this Court applied these principles in a freedom-of-contract context:

> It is the function of the court to construe the contract made by the parties, not to . . . to alter the contract they have made so as to conform it to the court's notion of the contract they should have made in view of the of the subject matter and the surrounding facts and circumstances . . . [G]eneral references to subjective notions of public policy cannot justify deviation from unambiguous contractual language. Public policy can only be implicated in the interpretation of a contractual agreement between private parties where it is 'explicit,' 'well-defined and dominant,' and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.

992 F.2d at 58 (citations omitted).

No reported decision in Maryland history has voided a contract for barratry. Maryland courts recognized shortly after the Civil War that barratry and its related doctrines were outdated holdovers from English law. *Schaferman v. O'Brien,* 28 Md. 565 (1868). As the majority observes, in 1908 Maryland did adopt a narrow statute prohibiting certain forms of barratry by lawyers and one form by non-lawyers, But as explained by the dissent, that statute, according to Maryland's courts, applies to non-lawyers only in cases of third-party solicitation, in the ordinary sense of that phrase, and even where solicitation for a service is for "personal gain" and even constitutes "officious meddling," it is not prohibited as barratry. Such "meddling" "does not make a permissive service barratry." *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 349 Md. 441, 459, 709 A. 2d 112, 121 (1998).

As the dissent here recognized, forensic auditing and the related services provided by AFS – even if increasing the likelihood of litigation – are unquestionably permissive services with legitimate business and commercial purposes. *See* Dissent at 23-26. Indeed, if the fee arrangement in the *Son* case was not barratrous or otherwise repugnant to Maryland public policy, it is inconceivable that the audit contracts in this case could be.

No reported decision by a Maryland court addresses whether arrangements like the contracts at here are barratrous or are otherwise illegal. If a federal court is to decide the issue, it must decide it as the State court would most likely decide it. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 418 (4th Cir. 1999). And in making such determination, the federal court "may seek guidance from all available sources, including decisions from other jurisdictions." *Id.*

While California never adopted the doctrines in question here, other states did – but subsequently abolished them. *E.g., Osprey, Inc. v. Cabana Limited Partnership*, 532 S.E.2d 269, 277 (S.C. 2000) ("we abolish champerty as a defense"); *Saldini v. Righellis*, 687 N.E.2d 1224, 1226 (1997) ("[T]he agreement . . . would be champertous were we to continue to recognize the offense. We no longer are inclined to do so."); *see generally*, Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (And Legal) Business*, 33 U. Mich. J. L. Reform 57 (1999-2000).

In *Bell County Board of Education v. Lee*, 39 S.W.2d 492 (Ky. 1931), the court upheld an agreement for auditing receipts of county officers in return for one third of any amount recovered as a result of the audits. "The mere fact

that the recovery of compensation is to be contingent upon the success of the suit is not sufficient to nullify the contract." 39 S.W.2d at 493. To the contrary, the Court found that enforcement of the agreement was in the public interest – to ensure that public officials "be held strictly to account and the courts look with favor upon all good-faith efforts seeking that end." *Id.*

Significantly, the action in *Bell* arose from defendant's refusal to act on plaintiff's audit. The court was not concerned, however, with the contingent recovery that so disturbed the majority here. In fact, the court held that plaintiff could "have his remedy by assuming the burden of first recovering the fund upon which his compensation is based." *Id.* at 496. The accountant was empowered to control the litigation leading to its recovery as a means of *furthering* the public interest, not violating it. *See also especially* and compare, *Temeron Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 325-26 (Okla. Ct. App. 1993); *see also generally, Sampliner v. Motion Picture Patent Co.*, 254 U.S. 233 (1920).[3]

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[3] As one commentator noted, "a variety of mechanisms are available to discourage [the] evils [of champerty], making a ban on champerty completely unnecessary." Martin, *supra*, at 83. These include causes of action for malicious prosecution and abuse of process and sanctions for the maintenance of frivolous suits. *Id.* As to the majority's second ground for voiding the contracts (Op. at 15), that "insofar as they provide for *expert* testimony for a contingent fee," AFS relies on the reasoning of the dissent. *See* Dissent at 26-27. Furthermore, the remedy for any ill perceived here is cross-examination of AFS' witnesses for bias and self-interest, not the voiding of contracts between sophisticated parties that are legal under the law of their formation. Finally, AFS agreed below and on appeal that if the Court believes AFS'

(Continued on following page)

Given the widespread consensus that the doctrines of maintenance, champerty and barratry long ago outlived their rationales, it is highly likely that, if faced squarely with the issue, a Maryland court would decline to void the contracts at issue here.

Finally, while the process may be uncommon, other circuits have granted rehearing *en banc* for the express purpose of invoking the certification procedure. *See, e.g., Todd v. Societe BIC, S.A.*, 9 F.3d 1216 (7th Cir. 1993) (*en banc*); see also note 1, *supra*. In *Todd*, the Seventh Circuit feared that the panel's decision on a state law question could encourage forum-shopping if federal and state interpretations diverged, and "the state [thus] loses the ability to develop or restate the principles that it believes should govern the category of cases. Certification then ensures that the law we apply is genuinely state law." *Todd*, 9 F.3d at 1222. The Court concluded that it was "far better to pose the questions to the only judges who can give definitive answers." *Id.*

CONCLUSION

The panel or the Court *en banc* should hold that in this case California law is not trumped by the public policy of Maryland and that, in any event, AFS' contracts with its clients do not violate Maryland public policy. If there is any doubt on the either issue, the panel or the Court may and should refer the issue to Maryland's highest court.

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employees should not testify as experts, then they will not. AFS will call independent experts at trial.

Dated this 12th day of August, 2002

Respectfully submitted,

/s/ Diane L. Gibson
Rodney R. Patula
Diane L. Gibson
Attorneys for Appellant

Squire, Sanders & Dempsey L.L.P.
Rodney R. Patula
Diane L. Gibson
One Maritime Plaza, Suite 300
San Francisco, California 94111
(415) 954-0200
Counsel for Appellant

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 18, 2002

NO. 00-1971
CA-99-2573-JFM

ACCRUED FINANCIAL SERVICES, INCORPORATED, for itself and as assignee of claims

Plaintiff-Appellant

v.

PRIME RETAIL, INCORPORATED; PRIME RETAIL, L.P.; PRIME RETAIL FINANCE, INCORPORATED; PRIME RETAIL FINANCE II, INCORPORATED; PRIME RETAIL FINANCE V, INCORPORATED; ARIZONA FACTORY SHOPS PARTNERSHIP; BEND FACTORY OUTLETS LIMITED PARTNERSHIP; BUCKEYE FACTORY SHOPS LIMITED PARTNERSHIP; CAROLINA FACTORY SHOPS LIMITED PARTNERSHIP; CASTLE ROCK FACTORY SHOPS PARTNERSHIP; CORAL ISLE FACTORY STORES LIMITED PARTNERSHIP; FLORIDA KEYS FACTORY SHOPS LIMITED PARTNERSHIP; GAINESVILLE FACTORY SHOPS LIMITED PARTNERSHIP; GROVE CITY FACTORY SHOPS PARTNERSHIP; GULF COAST FACTORY SHOPS LIMITED PARTNERSHIP; GULFPORT FACTORY SHOPS LIMITED PARTNERSHIP; HAGERSTOWN FACTORY SHOPS LIMITED PARTNERSHIP; HUNTLEY FACTORY SHOPS LIMITED PARTNERSHIP; INDIANAPOLIS FACTORY SHOPS LIMITED PARTNERSHIP; KANSAS CITY FACTORY OUTLETS LIMITED PARTNERSHIP; LATHAM FACTORY STORES LIMITED PARTNERSHIP; OUTLET VILLAGE OF LEBANON LIMITED PARTNERSHIP; LOVELAND FACTORY SHOPS LIMITED PARTNERSHIP; MAGNOLIA BLUFF FACTORY SHOPS LIMITED PARTNERSHIP;

MARKET STREET LIMITED; NEBRASKA CROSSING FACTORY SHOPS LIMITED PARTNERSHIP; NIAGARA INTERNATIONAL FACTORY OUTLETS LIMITED PARTNERSHIP; OAK CREEK FACTORY OUTLETS LIMITED PARTNERSHIP; OHIO FACTORY SHOPS PARTNERSHIP; OUTLET VILLAGE OF KITTERY LIMITED PARTNERSHIP; OXNARD FACTORY OUTLET PARTNERS; FACTORY OUTLETS AT POST FALLS LIMITED PARTNERSHIP; SAN MARCOS FACTORY STORES LIMITED; SHASTA OUTLET CENTER LIMITED PARTNERSHIP; TRIANGLE FACTORY STORES LIMITED PARTNERSHIP; HORIZON GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated; HORIZON GROUP PROPERTIES, INCORPORATED; HORIZON GROUP PROPERTIES, L.P.; FIRST HGI, INCORPORATED; SECOND HGI, INCORPORATED; THIRD HGI, L.L.C.; HGI PERRYVILLE, INCORPORATED, a/k/a Prime Outlets at Perryville Limited Partnership; HORIZON/GLEN OUTLET CENTERS LIMITED PARTNERSHIP, a/k/a Prime Retail, L.P.; FIRST HORIZON GROUP LIMITED PARTNERSHIP; SECOND HORIZON GROUP LIMITED PARTNERSHIP; THIRD HORIZON GROUP LIMITED PARTNERSHIP; H/G PERRYVILLE LIMITED PARTNERSHIP, a/k/a Prime Outlets at Perryville Limited Partnership; FINGER LAKES OUTLET CENTER, L.L.C.; HORIZON/GLEN GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated

Defendants-Appellees

NO: 01-1231
CA-00-2474-JFM

ACCRUED FINANCIAL SERVICES, INCORPORATED, for itself and as assignee of claims

Plaintiff-Appellant

v.

PRIME RETAIL, INCORPORATED; PRIME RETAIL, L.P.; PRIME RETAIL FINANCE, INCORPORATED; PRIME RETAIL FINANCE II, INCORPORATED; PRIME RETAIL FINANCE V, INCORPORATED; ARIZONA FACTORY SHOPS PARTNERSHIP; BEND FACTORY OUTLETS LIMITED PARTNERSHIP; BUCKEYE FACTORY SHOPS LIMITED PARTNERSHIP; CAROLINA FACTORY SHOPS LIMITED PARTNERSHIP; CASTLE ROCK FACTORY SHOPS PARTNERSHIP; CORAL ISLE FACTORY STORES LIMITED PARTNERSHIP; FLORIDA KEYS FACTORY SHOPS LIMITED PARTNERSHIP; GAINESVILLE FACTORY SHOPS LIMITED PARTNERSHIP; GROVE CITY FACTORY SHOPS PARTNERSHIP; GULF COAST FACTORY SHOPS LIMITED PARTNERSHIP; GULFPORT FACTORY SHOPS LIMITED PARTNERSHIP; HAGERSTOWN FACTORY SHOPS LIMITED PARTNERSHIP; HUNTLEY FACTORY SHOPS LIMITED PARTNERSHIP; INDIANAPOLIS FACTORY SHOPS LIMITED PARTNERSHIP; KANSAS CITY FACTORY OUTLETS LIMITED PARTNERSHIP; LATHAM FACTORY STORES LIMITED PARTNERSHIP; OUTLET VILLAGE OF LEBANON LIMITED PARTNERSHIP; LOVELAND FACTORY SHOPS LIMITED PARTNERSHIP; MAGNOLIA BLUFF FACTORY SHOPS LIMITED PARTNERSHIP; MARKET STREET LIMITED; NEBRASKA CROSSING FACTORY SHOPS LIMITED PARTNERSHIP; NIAGARA INTERNATIONAL FACTORY OUTLETS LIMITED PARTNERSHIP; OAK CREEK FACTORY OUTLETS LIMITED PARTNERSHIP; OHIO FACTORY SHOPS PARTNERSHIP; OUTLET VILLAGE OF KITTERY LIMITED PARTNERSHIP; OXNARD FACTORY OUTLET PARTNERS; FACTORY OUTLETS AT POST FALLS LIMITED PARTNERSHIP; SAN MARCOS FACTORY STORES LIMITED; SHASTA OUTLET CENTER LIMITED PARTNERSHIP; TRIANGLE FACTORY STORES LIMITED PARTNERSHIP; HORIZON GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated; HORIZON GROUP PROPERTIES, INCORPORATED; HORIZON GROUP PROPERTIES,

L.P.; FIRST HGI, INCORPORATED; SECOND HGI, INCORPORATED; THIRD HGI, L.L.C.; HGI PERRYVILLE, INCORPORATED, a/k/a Prime Outlets at Perryville Limited Partnership; HORIZON/GLEN OUTLET CENTERS LIMITED PARTNERSHIP, a/k/a Prime Retail, L.P.; FIRST HORIZON GROUP LIMITED PARTNERSHIP; SECOND HORIZON GROUP LIMITED PARTNERSHIP; THIRD HORIZON GROUP LIMITED PARTNERSHIP; H/G PERRYVILLE LIMITED PARTNERSHIP, a/k/a Prime Outlets at Perryville Limited Partnership; FINGER LAKES OUTLET CENTER, L.L.C.; HORIZON/GLEN GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated

Defendants-Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant has filed a petition for rehearing and rehearing en banc and a motion to certify questions of state law to the Maryland Court of Appeals. Appellees have filed responses in opposition to the petition and the motion.

Judge Michael voted to grant panel rehearing. Judges Niemeyer and Williams voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judges Widener, Michael, Traxler, and King voted to rehear the case en banc, and Chief Judge Wilkinson and Judges Wilkins, Luttig, Williams, Gregory, and Niemeyer voted against rehearing en banc. Judge Motz recused herself from all consideration of this case.

The Court denies the petition for rehearing and rehearing en banc. The Court further denies the motion to certify questions of state law to the Maryland Court of Appeals.

Entered at the direction of Judge Niemeyer for the the [sic] Court.

For the Court,

/s/ Patricia S. Connor
CLERK

CHRONOLOGY AND PROCEDURAL HISTORY OF LITIGATION BETWEEN PETITIONER ("AFS") AND RESPONDENTS ("PRIME PARTIES")

- On May 13, 1998, AFS sent a letter to the Prime Parties describing audit results, including overcharges and claims for relief to be asserted, including claims under the federal RICO statute, and requesting that within 10 days the parties' representatives meet in an effort to reach a pre-litigation settlement.

- On May 23, 1998, the Prime Parties commenced a declaratory judgment action in the Circuit Court for Queen Anne's County, Maryland, Case No. CV6575 seeking a determination that AFS cannot lawfully sue upon claims assigned to it by its audit clients ("the Queen Anne's Case").

- On June 18, 1998, AFS removed the Queen Anne's County Case to the U.S. District Court for the District of Maryland.

- On July 27, 1998 – and relying on the "bad faith" exception to the first-filed doctrine (see, e.g., *Capitol Records, Inc. v. Optical Recording Corp.*, 810 F. Supp. 1350, 1354 (S.D.N.Y. 1992); see also *Charles Schwab & Co., Inc. v. Duffy*, 1998 U.S. Dist. LEXIS 19606, at *4 (N.D. Cal. Dec. 8, 1998)) – AFS filed a civil action against the Prime Parties in U.S. District Court for the Central District of California, Case No. 98-6053, asserting two federal RICO claims and eight state-law claims (the "California Federal Action").

- On September 15, 1998, the U.S. District Court for the District of Maryland remanded the Queen Anne's County Case back to the Circuit Court in Queen Anne's County, Maryland.

- On July 1, 1999, the California Federal Action – upon motion by the Prime Parties filed in 1998 – was transferred to the U.S. District for the District of Maryland.

- On August 9, 1999, AFS voluntarily dismissed without prejudice the California Federal Action, then pending in the U.S. District for the District of Maryland, and simultaneously reasserted the same claims made in that action in a newly-filed civil action in the Circuit Court for the County of Baltimore, Maryland, Case No. 24-C-003851, (the "First Baltimore Case"), for the purpose of seeking to consolidate the Queen Anne's County Case with and into the First Baltimore Case, i.e., to bring all claims and controversies between the parties into a single case in which AFS would be the plaintiff.

- Before AFS could seek consolidation of the Queen Anne's County Case and the First Baltimore Case, the Prime Parties removed the latter action to the U.S. District Court for the District of Maryland, Case No. JFM 99 CV2573 (the "First Maryland Federal Action").

- On September 8, 1999, the Prime Parties moved to dismiss the First Maryland Federal Action on grounds, *inter alia*, that AFS lacks real-party-in-interest status and standing to sue on claims assigned to it by its audit clients, which motion was fully briefed and argued, including post-oral argument briefing, by January 28, 2000.

- On June 19, 2000, the U.S. District Court for the District of Maryland dismissed the First Maryland Federal Action on grounds that AFS lacked standing to sue on the claims assigned to it by its audit clients, and pursuant to 28 U.S.C. Section 1367(c), the court dismissed AFS's remaining claims – those which originated with AFS.

- On July 17, 2000, AFS filed its Notice of Appeal from the dismissal of the First Maryland Federal Action,

which was designated in the U.S. Court of Appeals for the Fourth Circuit as Appeal No. 00-1971.

- Contemporaneously with filing its Notice of Appeal from dismissal of the First Maryland Federal Action and pursuant to the Maryland "savings statute," Md. Rule (Civil Procedure) 2-101b, AFS refiled in the Circuit Court for the County of Baltimore Maryland (the "Second Baltimore Case"), Case No. 24-C-00-003614, reasserting the claims dismissed in the First Maryland Federal Action under 28 U.S.C. 1367(c) and, as a protective action and in light of doubts about statutes of limitations being tolled, the other claims that had been dismissed from the First Maryland Federal Action on grounds that AFS lacked standing to sue on those claims.

- On August 3, 2000, the Queen Anne's County Case was stayed pending resolution of the real-party-in-interest and standing issues raised by the Prime Parties in the First Maryland Federal Action.

- On August 15, 2000, the Prime Parties removed the Second Baltimore Case to the U.S. District Court for the District of Maryland (the "Second Maryland Federal Action") Case No. JFM-00-2474, which was assigned to the same District Court judge who had previously dismissed the First Maryland Action.

- In August 2000, the parties filed cross-motions in the Second Maryland Federal Action – AFS seeking a stay of that case, as a protective action until the then-pending appeal from the dismissal of the First Maryland Federal Action could be decided, and the Prime Parties seeking dismissal of the action with prejudice on grounds of *res judicata*, citing the prior dismissal of the same claims in the First Maryland Federal Action.

- On October 11, 2000, the U.S. District Court for the District of Maryland entered an order in the Second

Maryland Federal Action dismissing on res judicata grounds the nine claims for relief that had been previously dismissed from the First Maryland Federal Action on grounds that AFS lacked standing to sue on those claims and staying further proceedings on the two claims which had been dismissed from the First Maryland Federal Action under 28 U.S.C. 1367(c).

- On February 6, 2001, the U.S. District Court in the Second Maryland Federal Action granted AFS's motion to certify for immediate appeal under Fed. R. Civ. P. 54(b) the dismissal of nine of the eleven claims asserted in the Second Maryland Federal Action.

- On March 7, 2001, the U.S. Court of Appeals for the Fourth Circuit accepted for immediate appeal the partial dismissal of the Second Maryland Federal Case, and AFS thereupon filed a Notice of Appeal from that dismissal, which appeal was designated Appeal No. 01-1231 in the court of appeals.

- Thereafter, the U.S. Court of Appeals for the Fourth Circuit consolidated Appeal No. 00-1971 and Appeal No. 01-1231, the parties completed their briefing of the appeals, and on October 30, 2001 they presented oral argument to a three-judge panel of the court of appeals.

- After post-argument, supplemental briefing, the court of appeals, on July 29, 2002, and in a 2-1 decision, affirmed both final judgments challenged in the consolidated appeals.

- On August 12, 2002, AFS filed a timely petition for rehearing and rehearing *en banc*, together with a motion to certify questions of state law and policy to the Maryland Court of Appeals.

- On October 18, 2002, the court of appeals denied the petition for rehearing, and by a 6-4 vote of the active and participating judges of that court denied the petition for

rehearing *en banc*; the court also denied AFS's motion to certify questions of state law and public policy to the Maryland Court of Appeals.

STATE STATUTORY PROVISIONS

MD COURTS AND JUDICIAL PROCEEDINGS Code § 12-601 through § 12-609 (2002):

§ 12-601. Definitions:

(a) In general. – In this subtitle the following words have the meanings indicated.

(b) State. – "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(c) Tribe. – "Tribe" means a tribe, band, or village of Native Americans which is recognized by federal law or formally acknowledged by a state.

§ 12-602. Power to certify:

The Court of Appeals or the Court of Special Appeals of this State, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another state or of a tribe if:

(1) The pending litigation involves a question to be decided under the law of the other jurisdiction;

(2) The answer to the question may be determinative of an issue in the pending litigation; and

(3) The question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

§ 12-603. Power to answer:

The Court of Appeals of this State may answer a question of law certified to it by a court of the United States or by an appellate court of another state or of a tribe, if the

answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.

§ 12-604. Power to reformulate question:

The Court of Appeals of this State may reformulate a question of law certified to it.

§ 12-605. Certification order; record:

(a) Certification order. – The court certifying a question of law to the Court of Appeals of this State shall issue a certification order and forward it to the Court of Appeals of this State.

(b) Record. – Before responding to a certified question, the Court of Appeals of this State may require the certifying court to deliver all or part of its record to the court of Appeals of this State.

§ 12-606. Contents of certification order:

(a) In general. – A certification order shall contain:

(1) The question of law to be answered;

(2) The facts relevant to the question, showing fully the nature of the controversy out of which the question arose;

(3) A statement acknowledging that the Court of Appeals of this State, acting as the receiving court, may reformulate the question; and

(4) The names and addresses of counsel of record and parties appearing without counsel.

(b) Where parties unable to agree upon statement of facts. – If the parties cannot agree upon a statement

of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.

§ 12-607. Notice; response:

The Court of Appeals of this State, acting as a receiving court, shall notify the certifying court of acceptance or rejection of the question and, in accordance with notions of comity and fairness, respond to an accepted certified question as soon as practicable.

§ 12-608. Procedures:

(a) Maryland Rules. – After the Court of Appeals of this State has accepted a certified question, proceedings are governed by the Maryland Rules.

(b) Receiving state's rules. – Procedures for certification from this State to a receiving court are those provided in the rules and statutes of the receiving forum.

§ 12-609. Opinion:

The Court of Appeals of this State shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court, counsel of record, and parties appearing without counsel.

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

No. 02-1092

IN THE

Supreme Court of the United States

ACCRUED FINANCIAL SERVICES, INC.,

Petitioner,

v.

PRIME RETAIL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

CHARLES P. SCHEELER
Counsel of Record
GLEN K. ALLEN
PIPER RUDNICK LLP
6225 Smith Avenue
Baltimore, MD 21209
(410) 580-3000

Attorneys for Respondents

179228

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Prime Retail, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock. It is the sole general partner of Prime Retail, L.P. Horizon Group Properties, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Prime Retail, Inc. and Prime Retail, L.P. own, directly or indirectly, 100 percent of each of the other corporate respondents or those respondents have merged into Prime Retail, Inc., except that Third HGI, L.L.C. is owned by Horizon Group Properties, Inc. and Horizon Group Properties, L.P. HGI Perryville, Inc. has changed its name to Prime Outlets at Perryville, Inc., and is owned 100% by Prime Retail, Inc.

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REASONS FOR DENYING THE PETITION

Petitioner admits that the substantive issues presented in this case are "relatively obscur[e]." Pet. at 30. Petitioner does not assert that the questions presented meet any of the considerations governing review on certiorari set forth in Supreme Court Rule 10. Rather, Petitioner urges the grant of a writ of certiorari so that this Court may "clarify" issues regarding the determination of federal public policy and judicial federalism. Pet. at 2. Petitioner also contends that "the decision below is incorrect." Pet. at 27.

Petitioner's request for a writ should be denied. The decision of the Fourth Circuit Court of Appeals in this case is not in conflict with the decision of any other United States court of appeals, and is well within the accepted and usual course of judicial proceedings. By Petitioner's own admission, the substantive issues involved in this case are not of great importance to the public. *See Layner and Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing writ). Finally, this case neither presents a compelling platform to "clarify" issues of federal public policy or judicial federalism nor was it decided in error. The decision below is a narrow, fact-dependent ruling based exclusively upon state law. The Fourth Circuit held that certain assignments obtained by Petitioner violated the public policy of the state of Maryland because they were barratrous. Pet. at 16a-17a. The court determined Maryland's public policy in accord with accepted and usual practice: it looked to Maryland statutes and case law. Indeed, the Court relied on a Maryland statute explicitly prohibiting barratry as a clear legislative expression of Maryland's public policy on this issue. *See* Md. Code Ann., Bus. Occ. & Prof. Article, § 10-604(a)(1); Pet. at 15a.

A.

THE DECISION BELOW DOES NOT RAISE ISSUES RELATING TO THE FEDERAL COURTS' POWER TO DETERMINE PUBLIC POLICY THAT ARE WORTHY OF CONSIDERATION ON CERTIORARI

Petitioner advances two arguments in support of its assertion that the writ should be granted to clarify the limits of federal judicial power to articulate public policy. These are addressed in order below.

Petitioner first asserts that the Fourth Circuit barred testimony by an expert receiving a contingent fee, in conflict with a later evidentiary ruling by a federal bankruptcy court, namely, *In re Joy Recovery Technology Corp.*, 286 B.R. (Bankr. N.D. Ill. 2002). Pet. at 15. The Fourth Circuit, however, made no such evidentiary ruling. Rather, the court, as an alternate holding, stated that Petitioner's assignments were void as "against public policy insofar as they provide for supplying *expert* testimony for a contingent fee." Pet. at 17a (emphasis in the original). Thus, the court's ruling did not bar the introduction of evidence, but rather denied Petitioner standing to bring the claim, as its standing was premised upon an invalid assignment of claims. Pet. at 39a-40a. Accordingly, there is no conflict with the *evidentiary* ruling made by the bankruptcy court in *In re Joy Recovery Technology Corp.* In any event, "[t]he Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or another circuit." Stern and Gressman, *Supreme Court Practice* (8th Ed. 2002) at 237.

Petitioner next contends that the court below erroneously failed to apply federal law and policy to determine Petitioner's standing to prosecute federal claims. Pet. at 17. Petitioner admits that this issue "is not itself worthy of consideration on certiorari." *Id.* Respondent agrees. Moreover, neither the decision nor the record below presents this question. The court below relied on Maryland law to determine the validity of assignments encompassing "any and all causes of action." Pet. at 13a, 16a. This broad contractual assignment did not call for the application of federal law, and, as the majority opinion notes, Petitioner argued to the Fourth Circuit only the applicability of Maryland and California (not federal) law in its argument to the Fourth Circuit. Pet. at 10a.

B.

THE DECISION BELOW DOES NOT RAISE ISSUES RELATING TO THE DETERMINATION OF STATE LAW THAT ARE WORTHY OF CONSIDERATION ON CERTIORARI

There are two strands to Petitioner's argument that certiorari should be granted to clarify the federal courts' discretion in determining state law. First, Petitioner declares that "some federal courts determine and apply state law using a predictive or 'status quo' approach with little or no enunciated rationale for doing so." Pet. at 20. In its discussion, however, Petitioner makes no attempt to relate this issue to the decision below. Indeed, Petitioner admits that the Fourth Circuit grounded its conclusion regarding Maryland public policy upon a state statute prohibiting barratry. Pet. at 10. The court's use of state law as the basis for a determination of the state's public policy is hardly such

a departure "from the accepted and usual course of judicial proceedings" as to warrant the grant of a writ of certiorari. Supreme Court Rule 10(a).

Next, Petitioner urges that the writ be granted so that this Court may articulate standards to determine when a federal court should certify a question to a state court. Once again, this is not an issue raised by the decision below. Petitioner did not move to certify a question of state law to the Maryland Court of Appeals until it filed its motion for rehearing en banc, which, of course, was after the Fourth Circuit had rendered its decision. Pet. at 14. That motion was denied without comment. *Id.* The panel majority did not "decid[e] whether to employ an available certification procedure," as that issue was not before it. Pet. at 27. Accordingly, the Fourth Circuit's decision is not an appropriate vehicle for articulating standards regarding certification of state law questions, as urged by Petitioner. Moreover, as Petitioner correctly notes, this Court has previously "expressed its view as to the use of certification procedures by federal courts," and this case presents no compelling reason to revisit the issue. *See Lehman Brothers v. Schein*, 416 U.S. 386, 395 (1974) (Rehnquist, J., concurring); *see also Fiore v. White*, 528 U.S. 23, 29 (1999); *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988); *Arizonians for Official English v. Arizona*, 520 U.S. 43, 75-76 (1997); *Belloti v. Baird*, 428 U.S. 132, 146-47, 150-51 (1976).

C.

THE FOURTH CIRCUIT CORRECTLY DECIDED THIS MATTER

The grant of a writ is not appropriate merely to correct alleged error in a narrow, fact-dependent ruling which the parties agree involves "obscure" issues. Pet. at 30; Stern and Gressman at 459. This matter, however, was correctly decided.

The court correctly applied Maryland conflicts law in concluding that Maryland law applied to determine the validity of Petitioner's assignments. In particular, the court's opinion fully addressed whether Petitioner's assignments violated a strong public policy of Maryland. Relying on a statute expressly prohibiting "officious meddling" as contemplated by Petitioner's assignments, the court determined that such a strong public policy existed. Pet. at 15a-16a.

The court's conclusion that Petitioner's assignments violated this strong public policy was amply supported by the record. Petitioner, a self-styled "auditor" of fees charged to outlet center tenants, obtained assignments from certain tenants of Respondents' outlet centers of any claims they might have with respect to overcharges. Pet. at 6a. The Fourth Circuit correctly concluded that the assignments gave the outlet center tenant/assignors little control over litigation that the Petitioner might commence. Pet. at 13a. Pursuant to the assignments, Petitioner was to recover up to 50% of the alleged overcharges Petitioner purportedly uncovered, known in the assignments as the "Discrepancy," if the tenant recovered the Discrepancy from the landlord. If Petitioner

presented the Discrepancy to the tenant and the tenant declined to pursue recovery from the landlord, Petitioner was entitled to 40% of the Discrepancy — a figure unilaterally determined by Petitioner — as a "Cancellation Fee." Pet. at 6a. The effect was to make it financially prohibitive for the tenant to withdraw.

The assignments purported to assign to Petitioner all causes of action the tenants might have against the landlords to recover the Discrepancy. Litigation was the sole means contemplated in the assignments by which Petitioner might recover on the causes of action. If litigation occurred, the cost of litigation, including attorneys' fees, was subtracted from the recovery before determination of Petitioner's fees. Petitioner retained full discretion to accept or reject any settlement offers. If the tenant prevailed upon Petitioner to drop a legal action after the action has been commenced, the tenant became liable to Petitioner for Petitioner's litigation costs, including attorneys' fees. Pet. at 6a-7a.

As the Fourth Circuit noted, the tenants' rights were assigned, not in exchange for an existing value, but for future fees to be determined by decisions and value judgments controlled by Petitioner. Pet. at 12a. This gave Petitioner freedom to put a value on the Discrepancy without challenge by the tenants. It also gave Petitioner every incentive to render its value judgments in favor of finding a Discrepancy, so it could recoup the time and expense it had invested in its audit. Thus, Petitioner was given "the power to mine lawsuits, promote them, and profit off them without regard to the intent and desires of the injured party." Pet. at 16a. This arrangement, the Fourth Circuit properly found, violated Maryland public policy as codified in its statute outlawing barratry. Pet. at 15a.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

CHARLES P. SCHEELER
Counsel of Record
GLEN K. ALLEN
PIPER RUDNICK LLP
6225 Smith Avenue
Baltimore, MD 21209
(410) 580-3000

Attorneys for Respondents

(3)

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In The

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ACCRUED FINANCIAL SERVICES, INC.,

Petitioner,

v.

PRIME RETAIL, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY BRIEF

RODNEY R. PATULA
Counsel of Record
DIANE L. GIBSON
AMY E. ROSE

SQUIRE, SANDERS & DEMPSEY L.L.P.
One Maritime Plaza
San Francisco, California 94111
(415) 954-0200

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY BRIEF

Respondents contend that "[t]he decision below is a narrow, fact-dependent ruling based exclusively upon state law." Opp. at 1. Certainly, the rulings below – made on motions to dismiss and directed to federal and state law claims – should not have been "fact-dependent" at all and should not have been based on state law alone. But more important here, the *questions* presented for review by this Petition are not narrow, factual, or concerned with state law. The lower courts barred the legal owner of claims for relief from suing on those claims in *federal* court. Federal law should have governed Petitioner's standing to sue on its federal claims. As to the state law claims, it is true that standing was dependent substantively on state law and public policy; however the *means* by which the courts below determined that state law and policy raise substantial federal questions, including questions of judicial federalism and of federal judicial discretion and restraint.

Also, the lower courts not only barred a party from suing, they barred its employees from testifying in federal court – purely a federal concern:

> The per se exclusion of whole categories of evidence is disfavored by the Federal Rules of Evidence. It is a fundamental tenet of those rules that, with few exceptions, 'all relevant evidence is admissible,' Fed. R. Evid. 402, and 'every person is competent to be a witness,' Fed. R. Evid. 601.

United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (rejecting a "per se rule that disqualifies the compensated informer from testifying as a witness"). This case asks whether federal courts have discretionary power

to recognize and to apply "policy-based" exceptions to this general rule and, if so, the limits of that power.

A. The Question of Federal Public Policy Was Raised and Considered Below.

The Opposition (at 3) contends that "Petitioner argued to the Fourth Circuit only the applicability of Maryland and California (not federal) law. . . . " In fact, however, AFS contended in its Opening Brief in the court of appeals that:

> [T]he [District] Court applied the doctrine of champerty and proclaimed that the public policies of California, Maryland and the *United States* prohibit contracts such as those [into] which AFS and its audit clients have entered. With all due respect, the District Court was wrong on *all counts*.
>
> . . . .
>
> The District Court . . . held that [the audit] agreements violate California, Maryland and *federal* public policy. That conclusion is erroneous. . . .
>
> The District Court's [holding] is tantamount to a judicial declaration of public policy for Maryland and the *United States* [in addition to California]. This is in derogation of the separation of powers clause [as the] formulation of public policy is the function of the Legislature, not that of the courts.

Supp. App., *infra* at 2sa, 3sa, 4sa (emphasis added and citations omitted). The district court held that if the choice-of-law provisions in the audit contracts were not enforceable, then "I would hold that witness contingency fee agreements affirmatively violate the fundamental

policy of the United States." App. at 40a, n.3. The district court identified no basis, other than its own judgment, for that conclusion. For its part, the court of appeals held that a Maryland court *would* disregard the choice-of-law provisions in the audit contracts – even though neither side challenged the district court's contrary conclusion – and then the panel majority ignored federal policy altogether. Petitioner can hardly be faulted for the panel majority's wild trajectory on choice-of-law issues and the applicability of federal law and policy. S. Ct. Rule 10(a).

Neither side was able to cite below – and neither has cited here – any authority for a federal policy against the assignment or prosecution of federal claims on any of the grounds articulated by the lower courts in this case. But that circumstance only confirms that those courts chartered on their own the public policies they invoked. *See especially* Question 1 in Petition at i. The issue of federal law and policy was properly raised below.[1]

B. This Case Does Present a Substantial Conflict Between Circuits – and About an Important Issue of Federal Law.

The Opposition pretends that the rulings below are not "evidentiary," and that therefore they cannot conflict with rulings in other circuits which recognize that expert

[1] In their Answer to the Petition for Rehearing below, Respondents asserted that Petitioner cannot "claim that the Court contravened rules [for determining or enforcing public policy] specifically applicable to a federal court." Supp. App., *infra* at 7sa. To the extent that is true, it is so because the rules are far from certain, especially in the absence of legislative pronouncements.

witnesses paid on a contingent basis are nonetheless competent to testify in federal court. The rulings below *are* evidentiary – but they are not merely evidentiary.

The lower courts barred AFS from the courthouse and thereby necessarily barred AFS from presenting *any* evidence, including the testimony of its own employees. The sole rationale for the district court's opinion and the "additional" basis for the court of appeals' decision was that if AFS were allowed to sue then its employees could testify, and its employees could not testify when they would be doing so to secure a contingency fee for their employer. On this point, the decisions below are directly in conflict with decisions by other federal circuit – not just district – courts. *See Braun v. Lorillard Inc.*, 84 F.3d 230, 237-38 (7th Cir. 1996); *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1019 (5th Cir. 1993); *Webb v. Hyman*, 861 F. Supp. 1094, 1115 (D.D.C. 1994); *see also Tagatz v. Marquette University*, 861 F.2d 1040, 1042 (7th Cir. 1988); *United States v. Cervantes-Pacheco, supra*, 826 F.2d at 1315-16; *Universal Athletic Sales Co. v. American Gym Recreational & Athletic Equipment Corp.*, 546 F.2d 530, 539 (3d Cir. 1976).[2]

Moreover, the issue here implicates the federal courts' discretionary power to frame an exception to a "fundamental tenet" of the Federal Rules of Evidence. And at the very least, the exercise of such discretion, camouflaged as the enforcement of a "fundamental public policy," raises the

[2] At least one judge of the District of Maryland other than the judge who decided this case has followed the district court's decision in this case and has applied it to strike evidence. *See Farmer v. Ramsey*, 159 F. Supp. 2d 873, 883 (D. Md. 2001) (Legg, J.).

question of whether the courts below "departed from the accepted and usual course of judicial proceedings [so] as to call for an exercise of this Court's supervisory powers." S. Ct. Rule 10(a).

C. Review on the Second Question Presented – Concerning Federalism and Certification of State-Law Issues – Would Not "Revisit" Issues Previously Decided by this Court.

Contrary to the Opposition (at 3-4), the lower courts did not merely consult a state statute or other pronouncement of state law and from them confirm applicable state public policies; rather, each using the "predictive approach" reached conflicting conclusions as to *which* state's law and public policy is applicable in this case and "distilled from obscure and uncertain sources" the public policies of the states in question. *See* Pet. at 27. Thereafter, the court of appeals refused – even in the face of a compelling dissent on the state-law issues – to certify those issues to the Maryland Court of Appeals. That the court failed to explain its refusal does not diminish the worthiness for review of the second question presented. Plainly, the court of appeals exercised unfettered discretion in refusing the certification request. *See* and *compare Dugger v. Johnson*, 485 U.S. 945, 946 (1988); *United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 919 (9th Cir. 1998) ("meaningful appellate review for abuse of discretion is foreclosed when the [lower] court fails to articulate its reasoning"); *see also Zinniel v. Comm'r*, 883 F.2d 1350 (7th Cir. 1989); *Berks v. United States*, 825 F.2d 1262 (8th Cir. 1987). And that is the very point of the second question presented. *See* Question 2 in Petition at i. If, as Petitioner contends, a lower court's discretion in this context should

be qualified *solely* by concerns of federalism, then there is a need for this Court to so rule. None of the prior decisions of this Court has done so.[3]

As is true of the decisions on this point cited in the Petition (at 23-27), the additional cases cited in the Opposition – *Fiore v. White*, 528 U.S. 23 (1999) and *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988) – involved constitutional issues the determination of which could or would be affected by the resolution of an uncertain question of state law. Similarly, in *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963), this Court's jurisdiction under 28 U.S.C. § 1257 to review state court convictions depended upon uncertain state law rules regarding the scope of review by the state's courts. But none of these cases involved the exercise of discretion to certify on purely *Erie*-federalism grounds.

D. The Errors Below May Warrant Summary Action by This Court.

The Opposition is feeble indeed in its defense of the decisions below. First, the panel majority did not merely apply Maryland's barratry statute. On its face, the statute

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[3] The Opposition does not respond at all to the evident inconsistencies among the circuits in deciding whether to use certification procedures. *See* Pet. at 25-26 and authority there discussed; *see also* and *compare Goodlett v. Kalishek*, 223 F.3d 32, 37 n.4 (2d Cir. 2000); *DeWeerth v. Baldinger*, 836 F.2d 103, 108 n.5 (2d Cir. 1987); *Boyter v. C.I.R. Service*, 668 F.2d 1382, 1385-86 (4th Cir. 1981); *Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir. 1976). As Respondents acknowledged below, "[t]here are no separate rules, well established or otherwise, 'governing how a federal court is to determine the public policy of a State.'" Supp. App., *infra* at 7sa.

does *not* apply here. *See* App. at 28a-32a and 66a-70a; *see also* and *compare Temeron, Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 325-26 (Okl. Ct. App. 1993). Second, the cancellation fee in the audit contracts is a term to which the audit clients agreed. The tenant's assignment of its claims against its landlord, like the cancellation terms and all other rights of the auditor created by the audit contracts, were in consideration for audit and collection services – all on terms bargained for by sophisticated parties, not "unilaterally determined" by the auditor. The only public policy implicated here is the freedom of contract. And finally, contrary to the Opposition (at 6), an assignment for a promise to perform future services is as enforceable as any other contract supported by such consideration. *See, e.g., Estate of Cohen,* 66 Cal. App. 2d 450, 458-59, 152 P.2d 485 (1944); *Angeles Real Estate Co. v. Kerxton*, 737 F.2d 416, 419 (4th Cir. Md. 1984) (applying Maryland law).

Though not sufficient alone to warrant this Court's review on *certiorari*, the decisions below are substantively wrong with respect to Petitioner's standing to sue on the federal claims asserted below. This Court may decide summarily that the court of appeals erred and vacate the judgment accordingly. S. Ct. Rule 16.1.

As to the judgment dismissing the state-law claims, this Court should vacate the judgment and certify the state law and public policy issues to the Maryland Court of Appeals. *See, e.g., Aldrich v. Aldrich*, 375 U.S. 249 (1963); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963). At a minimum, this Court should vacate the judgment and remand to the court of appeals with instructions that it explain its refusal to certify the questions presented here. S. Ct. Rule 16.1.

CONCLUSION

Respondents emphasize "that the *substantive* issues presented in this case are 'relatively obscur[e]'." Opp. at 1 (emphasis added). That, however, misses the point. The *questions presented for review* are not obscure in the least. They go to the essence of judicial power in the federal courts. How a federal court – in the absence of Congressional pronouncement – determines federal public policy, *how* it enforces it, and the extent of its discretion in doing so are indeed important questions. Similarly, whether a federal court's discretion in deciding to certify questions of state law and policy is subject to limits based solely on principles of federalism is a question of importance equal to that of other questions of federalism this Court has addressed in recent terms. Lastly, the decisions in this case, the bases stated for them, and the evident processes by which they were reached, cry out for the exercise of this Court's supervisory power. There is compelling need for this Court to answer those questions and to exercise that power. The Petition should be granted.

Respectfully submitted,

RODNEY R. PATULA
Counsel of Record
DIANE L. GIBSON
AMY E. ROSE

SQUIRE, SANDERS & DEMPSEY L.L.P.
One Maritime Plaza
San Francisco, California 94111
(415) 954-0200

Counsel for Petitioner

RECORD NO. 00-1971
And
RECORD NO. 00-1231

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ACCRUED FINANCIAL SERVICES, INC.,

Plaintiff-Appellant,

v.

PRIME RETAIL, INC., et al.,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

BRIEF OF APPELLANT IN CONSOLIDATED APPEAL

Rodney R. Patula, Esq.
Diane L. Gibson, Esq.
Squire, Sanders & Dempsey L.L.P.
One Maritime Plaza, Suite 300
San Francisco, California 94111
(415) 954-0200

Counsel for Appellant

* * *

Also assignments in which assignor and assignee share the proceeds of the chose-in-action are valid. See also *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Serv. Bureau,* 701 F.2d 1276, 1282 (9th Cir. Or. 1983), *cert denied* 464 U.S. 822 (1983) (holding that "[a]n assignment of claims does not prevent the assignors from receiving the benefits of the litigation."); *Estate of Cohen,*

66 Cal. App. 2d 450, 458-459, 152 P.2d 485 (1944) (upholding an assignment by an heir to an heir-hunter agency of 30% interest in the estate of the heir's relative); see also *Angeles Real Estate Co. v. Kerxton,* 737 F.2d 416, 419 (4th Cir. Md. 1984).

In this case, however, because the assignment agreements between AFS and its audit clients contemplate services about which AFS employees *could* testify and because AFS' compensation for its services is contingent, the District Court struck down the assignments. The court ruled:

> . . . [T]he assignments made by the tenants to AFS are void as a matter of public policy because they are champertous. . . . Financial arrangements that provide incentives for the falsification or exaggeration of testimony threaten the very integrity of the judicial process which depends upon the truthfulness of the witness.

JA 0582, 0584. In so ruling, the Court applied the doctrine of champerty and proclaimed that the public policies of California, Maryland and the United States prohibit contracts such as those in which AFS and its audit clients have entered. With all due respect, the District Court was wrong on all counts.

A. California Has Never Adopted the Doctrine of Champerty

The District Court held that AFS' assignments were champertous and thus against the public policy of California. Champerty is a sub-species of the now long extinct offense of "maintenance," which was the "officious

intermeddling in a suit which in no way belongs to the intermeddler, by maintaining or assisting either

* * *

The agreements in this case and in *Termeron* are indistinguishable. Even if some basis existed for applying principles of champerty here, Prime has never claimed and cannot in good faith claim that AFS intended to stir up unnecessary or frivolous litigation, lacked any interest in the claims which it identified under a contract for services, intended to investigate whether the claims existed, or otherwise acted in bad faith. And even if Prime could make such a showing, modern tort law and the law of sanctions provides more than adequate remedies for Prime – *after* it successfully defends its conduct against AFS' allegations. Invalidating AFS' assignments and effectively precluding litigation on the merits of the claims against Prime was and is unwarranted.

In short, the District Court erred in applying the doctrine of champerty at all, but even if it could be properly applied here, the District Court misapplied it.

II. AFS' ASSIGNMENTS ARE NOT CONTINGENCY FEE AGREEMENTS FOR EXPERT TESTIMONY AND DO NOT VIOLATE ANY POLICY

The District Court construed the assignments in this case as contingent fee agreements for expert testimony and held that such agreements violate California, Maryland and federal public policy. That conclusion is erroneous for at least four reasons:

First, the agreements between the tenants and AFS do not call for or even contemplate testimony of AFS' employees as experts in exchange for a contingency fee. JA 0654-0755. Second, even if it were improper for AFS' employees to offer expert testimony when AFS had an interest in the outcome, such impropriety should not have voided AFS' assignments when AFS explicitly agreed that its employees would not testify as expert witnesses if the District Court ruled that such testimony would be improper. JA 0464-0465. Third, the District Court found that in light of the ratifications AFS obtained from each of its

* * *

Also, like AFS, a *qui* tam plaintiff is usually a witness to the fraudulent activity he or she is attempting to expose and may be called as a percipient or even an expert witness. Indeed, a court has no jurisdiction over a *qui tam* action if it is based upon public disclosure of the allegations. In other words, one cannot maintain a *qui tam* suit unless he or she qualifies as the "original source" of the information; he or she must have "witness[ed] some aspect of the fraudulent activity himself or otherwise discover, through his own labor, the information underlying his allegations." *Wercinski v. International Business Machines Corp.*, 982 F. Supp. 449, 461 (S.D.Tex. 1997); *United States, ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F. 3d 1156, 1161 (10th Cir. Kan. 1999). This "original source" requirement necessarily entails testimony by the *qui tam* plaintiff.

AFS is a proper plaintiff under the substantive and procedural law which applies here. Its ability to prosecute the claims it asserts is not vitiated by the fact that its

employees may testify for it in a case in which it has a financial interest.

D. The District Court Erred In Taking Up The Legislature's Function Of Formulating Public Policy

In footnote 3 of its opinion, the District Court stated:

> I have structured my analysis in the test as a choice-of-law issue. I have done so because California law so clearly prohibits witness contingency fee agreements. Perhaps I should add that if Maryland or federal common law were found to apply to the issue, I would hold that witness contingency fee agreements affirmatively violate the fundamental policy of Maryland and the United States.

JA 0584. The District Court's statement is tantamount to a judicial declaration of public policy for Maryland and the United States. This is in derogation of the separation of powers clause. The formulation of public policy is the function of the Legislature, not that of the courts. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 691-692 (1981) (function of articulating public

* * *

NO. 00-1971
and
NO. 01-1231

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ACCRUED FINANCIAL SERVICES, INC.,

Plaintiff-Appellant,

v.

PRIME RETAIL, INC., *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

APPELLEES' ANSWER IN OPPOSITION TO APPELLANT'S PETITION FOR REHEARING AND FOR REHEARING *EN BANC*

Charles P. Scheeler
Glen K. Allen
PIPER RUDNICK LLP
6225 Smith Avenue
Baltimore, Maryland 21209-3600
(410) 580-3000

Counsel for Appellees

* * *

App. Lexis 33801 (4th Cir. Sep. 13, 1991). This alleged "conflict," even if it existed, would not justify *en banc* review.

In any event, there is no conflict. AFS asserts that the conflict arises because the opinion supposedly supplanted

the three-step choice-of-law analysis Maryland courts have employed under § 187 with a one-step analysis. The court, however, did not alter or reject Maryland case law interpreting and applying § 187. To the contrary, the Court expressly invoked § 187. The Court simply found it unnecessary under the circumstances of this case to address explicitly the first and third steps of the analysis. It did not supplant the three-step analysis with a different analysis, it simply condensed the analysis. *See* pages 6-8 *infra.*

The second "conflict" AFS purports to identify is the opinion's supposed "contraven[tion]" of "well-established rules governing how a federal court is to determine the public policy of a state." AFS Petition at 1. AFS here again attempts to impart a federal character to the opinion it does not possess. There are no separate rules, well-established or otherwise, "governing how a federal court is to determine the public policy of a State." On an issue of state law (as here), a federal court is bound under *Erie* to determine a state's public policy just as a state court would. And that is precisely what the Court did: it relied on Maryland cases and Maryland statutes to determine Maryland public policy. AFS may not like the conclusion the Court reached, but it cannot accurately claim that the Court contravened rules specifically applicable to a federal court.

In addition to the purported "conflicts" discussed above, AFS also asserts that the choice-of-law and public policy issues constitute questions of "exceptional importance." Yet, there are no widespread ramifications to the federal system created by the Court's opinion that require

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No. _____

In The

Supreme Court of the United States

ACCRUED FINANCIAL SERVICES, INC.,

Petitioner,

v.

PRIME RETAIL, INCORPORATED, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

RODNEY R. PATULA
Counsel of Record
DIANE L. GIBSON
AMY E. ROSE

SQUIRE, SANDERS & DEMPSEY L.L.P.
One Maritime Plaza
San Francisco, California 94111
(415) 954-0200

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

125 pp

QUESTIONS PRESENTED FOR REVIEW

The lower courts in this case dismissed both federal and state law claims on grounds that plaintiff lacked standing to sue. In doing so, they invoked public policies akin to those prohibiting champerty and maintenance, which the court of appeals held were so strong and fundamental as to trump the choice of law contracting parties had made to govern their contracts. The questions presented for review are:

1. Faced with a public-policy-based challenge to a plaintiff's standing to sue on claims for relief under federal law and in the absence of congressional articulation of the policy in question, what standards and limitations must a federal court observe in determining the public policy asserted and in enforcing it?

2. Aside from *Erie*-based abstention, are there circumstances in which a federal court abuses its discretion if it refuses to certify a question of state law or public policy to the highest court of the state and, if so, what factors should guide the court in exercising its discretion to certify or not?

LIST OF PARTIES

Including the parties named in the caption of this Petition, the parties are: the petitioner, ACCRUED FINANCIAL SERVICES, INC., and the following 61 respondents:

PRIME RETAIL, INCORPORATED; PRIME RETAIL, L.P.; PRIME RETAIL FINANCE, INCORPORATED; PRIME RETAIL FINANCE II, INCORPORATED; PRIME RETAIL FINANCE V, INCORPORATED; ARIZONA FACTORY SHOPS PARTNERSHIP; BEND FACTORY OUTLETS LIMITED PARTNERSHIP; BUCKEYE FACTORY SHOPS LIMITED PARTNERSHIP; CAROLINA FACTORY SHOPS LIMITED PARTNERSHIP; CASTLE ROCK FACTORY SHOPS PARTNERSHIP; CORAL ISLE FACTORY STORES LIMITED PARTNERSHIP; FLORIDA KEYS FACTORY SHOPS LIMITED PARTNERSHIP; GAINESVILLE FACTORY SHOPS LIMITED PARTNERSHIP; GROVE CITY FACTORY SHOPS PARTNERSHIP; GULF COAST FACTORY SHOPS LIMITED PARTNERSHIP; GULFPORT FACTORY SHOPS LIMITED PARTNERSHIP; HAGERSTOWN FACTORY SHOPS LIMITED PARTNERSHIP; HUNTLEY FACTORY SHOPS LIMITED PARTNERSHIP; INDIANAPOLIS FACTORY SHOPS LIMITED PARTNERSHIP; KANSAS CITY FACTORY OUTLETS LIMITED PARTNERSHIP; LATHAM FACTORY STORES LIMITED PARTNERSHIP; OUTLET VILLAGE OF LEBANON LIMITED PARTNERSHIP; LOVELAND FACTORY SHOPS LIMITED PARTNERSHIP; MAGNOLIA BLUFF FACTORY SHOPS LIMITED PARTNERSHIP; MARKET STREET LIMITED; NEBRASKA CROSSING FACTORY SHOPS LIMITED

LIST OF PARTIES – Continued

PARTNERSHIP; NIAGARA INTERNATIONAL FACTORY OUTLETS LIMITED PARTNERSHIP; OAK CREEK FACTORY OUTLETS LIMITED PARTNERSHIP; OHIO FACTORY SHOPS PARTNERSHIP; OUTLET VILLAGE OF KITTERY LIMITED PARTNERSHIP; OXNARD FACTORY OUTLET PARTNERS; FACTORY OUTLETS AT POST FALLS LIMITED PARTNERSHIP; SAN MARCOS FACTORY STORES LIMITED; SHASTA OUTLET CENTER LIMITED PARTNERSHIP; TRIANGLE FACTORY STORES LIMITED PARTNERSHIP; HORIZON GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated; HORIZON GROUP PROPERTIES, INCORPORATED; HORIZON GROUP PROPERTIES, L.P.; FIRST HGI, INCORPORATED; SECOND HGI, INCORPORATED; THIRD HGI, L.L.C.; HGI PERRYVILLE, INCORPORATED, a/k/a Prime Outlets at Perryville Limited Partnership; HORIZON/GLEN OUTLET CENTERS LIMITED PARTNERSHIP, a/k/a Prime Retail, L.P.; FIRST HORIZON GROUP LIMITED PARTNERSHIP; SECOND HORIZON GROUP LIMITED PARTNERSHIP; THIRD HORIZON GROUP LIMITED PARTNERSHIP; H/G PERRYVILLE LIMITED PARTNERSHIP, a/k/a Prime Outlets at Perryville Limited Partnership; FINGER LAKES OUTLET CENTER, L.L.C.; HORIZON/GLEN GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies and that no publicly held company owns 10% or more of the petitioner's stock.

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The opinion of the court of appeals (App., *infra* at 1a-18a) is reported at 298 F.3d 291, and the dissenting opinion filed therewith (App., *infra* at 18a-33a) is reported beginning at 298 F.3d 300. The opinion of the district court (App., *infra* at 34a-41a) on standing and public policy is reported at 2000 WL 976800, and its opinion on *res judicata* (App., *infra* at 42a-45a) is reported at 2000 WL 1528697.

JURISDICTION

The court of appeals' judgment was entered on July 29, 2002. App., *infra* at 48a-51a. On October 18, 2002, a timely petition for rehearing and rehearing *en banc* and motion for certification of questions of state law and public policy to the Maryland Court of Appeals (App., *infra* at 52a-71a) was denied – after the court directed and received respondents' answer to the petition and motion – by a 6-4 vote of the active and participating judges of the court of appeals. App., *infra* at 72a-76a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of Article III of the United States Constitution provides in relevant part: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Section 2, Clause 1 of Article III of the United States Constitution provides in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . [and] to Controversies between . . . Citizens of different States. . . ."

The Federal Judiciary Act, 28 U.S.C. § 1652, provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The Maryland certification statute, Md. Cts. & Jd. Proc. Code §§ 12-601 to 12-609, is reproduced at App., *infra* at 82a-84a.

STATEMENT OF THE CASE

This case presents the opportunity to clarify when and how a federal court may "find" federal public policy and how it may enforce such policy. It also presents the subsidiary question of witness exclusion as a means of enforcing federal public policy, a question on which federal courts in the circuits have disagreed, with one lower court in the Seventh Circuit explicitly rejecting the holding of the Fourth Circuit in this case.

The case also raises important questions of federal judicial restraint and judicial federalism and presents the opportunity for the Court to define and to clarify the factors which should guide a federal court's discretion either to determine unsettled state law or public policy or to defer to the highest court of the state to make such determination. It also presents subsidiary issues concerning freedom of contract, public policy as a source of limitations upon that freedom, and the circumstances under which one state must enforce or may disregard the parties' choice that the law of another state shall govern their contract. The latter implicates not only "full faith and credit" principles but has enormous practical implications for the conduct of business in interstate commerce and, by logical extension, in foreign commerce.

The two consolidated actions below were originally brought by Accrued Financial Services, Inc. ("AFS") in Maryland state court – both actions against the same 61

related corporations and partnerships (collectively, the "Prime Parties") and both asserting the same 11 claims for relief – two federal claims and nine state-law claims. The Prime Parties timely removed both cases to the U.S. District Court for the District of Maryland, which possessed jurisdiction over the federal claims under 28 U.S.C. § 1331 and over the state law claims under 28 U.S.C. § 1367.[1]

A. AFS's Business and the Audit Contracts In Question

AFS is located in Long Beach, California. When this litigation began, it employed six commercial real estate professionals providing various services to tenants in commercial buildings. Before the decisions in this case, AFS specialized in auditing expense charges made by landlords under leases in factory outlet malls, including 56 such malls owned and operated by the Prime Parties which are involved in this litigation. The Prime Parties are headquartered in Baltimore, Maryland. The malls in question here are located throughout the United States, including California, Maryland, and 22 other states. The Prime Parties' tenants, who are also audit clients of AFS, are large retailers such as Anne Klein, Corning Revere, Publisher's Warehouse, and Lechter's.

As is common in leases of commercial space, the Prime Parties' leases obligate their tenants to pay, in addition to base rent, certain operating expenses, known as "common area maintenance" or "CAM" charges and additional monies for certain "reserves." Under the leases,

[1] The procedural history of the litigation is detailed in the Appendix. App., *infra* at 77a-81a. That history and the circumstances leading to the filing of two separate, but essentially identical actions, and the subsequent consolidation of the two cases is not pertinent to any substantive issue raised by this petition.

the tenants are permitted to audit those charges and may do so using outside auditing firms such as AFS.

Audits are important because of the manner in which the tenants are billed for CAM charges and reserves. Usually, the mall manager incurs or forecasts hundreds of expenses for the entire facility and "accrues" them into but a few, broad accounting categories. It then divides the total charges in each category among the tenants, usually on a square footage basis, and invoices the tenants accordingly. The tenants seldom, if ever, see what they are paying for other than in summary statements, without details, and in similarly conclusory "reconciliation statements" at the end of each year. Absent audits, the tenants cannot be certain that the charges are proper.

In the usual case, an audit will reveal some errors and discrepancies and occasionally overly aggressive interpretations of lease terms. But typically, overcharges discovered at a mall during a given audit period are relatively small. Thus, most tenants do not find it economical to conduct their own audits. But companies like AFS, by auditing for several tenants in the same facility and conducting a single audit for the entire facility, make the tenants' right to audit practicable and thereby meaningful.

Also, because the overcharges found are usually relatively small, many tenants are unwilling to hire auditors on an hourly basis. AFS and other companies offer their services for compensation contingent on the amount actually recovered. And because the compensation is contingent on actual recovery, and not merely on the preparation on an audit report, the auditor commonly takes an assignment of the tenants' claims for any overcharges discovered. Such assignments are also frequently attractive to tenants because they are in an ongoing business relationship with their landlords. If suit should become necessary to collect overcharges, the tenant may prefer that the suit be prosecuted not by it directly, but by the auditor. Also, in AFS's case, AFS bears all expenses

incurred in any litigation it commences – putting its own money where its audit report is.

Uniformly (and in all the audit contracts at issue here), AFS and its clients agreed that their contracts would be governed by California law.

B. The Facts Giving Rise to the Present Litigation

Whether an audit discloses small or large discrepancies, the discrepancies are typically adjusted by way of a refund or partial abatement of future payments by the tenant. Only rarely is a lawsuit required. However, in 1997, AFS conducted two audits of several malls owned then or subsequently acquired by Prime Parties. AFS discovered improper charges and reserve assessments that could not be explained as mere errors or even aggressive billing practices. Instead, the audits revealed regular and repeated efforts to conceal from tenants the true nature of charges they had paid. The audit results suggested an intentional course of conduct over a period of at least four years and involving multiple victims who had lost collectively tens of millions of dollars. Furthermore, when AFS's second audit, at the Prime Parties' headquarters in Baltimore, began to confirm such misconduct and its pervasiveness, the Prime Parties took steps to end the audit before it could be completed.

Because of the nature and magnitude of the overcharges that AFS had discovered, it reported its audit findings to its clients and retained counsel. When counsel subsequently contacted the Prime Parties and proposed negotiations toward a settlement before litigation, they responded by filing a declaratory judgment action in a remote county court in Maryland challenging AFS's right to sue on claims for relief assigned to it by its clients. With due regard for, and relying upon, the so-called "bad faith" exception to the first-filed doctrine, (*see, e.g.*, App., *infra* at 77a and authorities there cited), AFS commenced an independent action, which was eventually removed from Maryland state court to Maryland federal court. That is

one of the two cases that are the subject of this petition. *See also* n.1, *supra*, and App., *infra* at 77a-81a.

AFS asserted nine claims as assignee of 12 tenants of space in one or more of the factory outlet malls owned or managed by Prime Parties and two claims in AFS's own right. The assigned claims were for violation of the federal Racketeering and Corrupt Practices Act, for violation of California statutory law, for fraud and for breaches of express and implied covenants in the tenants' leases. AFS also asserted claims for the Prime Parties' alleged tortious interference in AFS's contracts and in its business relationships with its audit clients.

C. The District Court's Decision Dismissing AFS's Claims for Relief

After AFS's case was removed to federal court, the Prime Parties moved to dismiss AFS's claims on various grounds – primarily AFS's lack of real-party-in-interest status under Fed. R. Civ. P. 17(a) and AFS's lack of standing to sue on the assigned claims. The Prime Parties contended, *inter alia,* that the claims assignments are not true conveyances of the tenants' claims and that the audit contracts are unenforceable as they call for AFS's employees to provide testimony for a contingent fee, contrary to public policy; therefore, according to the Prime Parties, the assignments in the contracts are invalid.

While AFS believed (and still believes) that the original assignments in the audit contracts were legally effective, in response to the defense motions AFS secured from its audit clients a ratification, stating:

> Company [i.e., tenant] hereby confirms that it has conveyed to AFS title to the claims, in order to allow AFS to prosecute same solely in AFS's own name – without the Company joining in the Litigation or otherwise acting to recover on such claims – and without any expense or liability whatsoever on the Company's part. If and to the extent necessary to effectuate the Company's

> purpose in assigning to AFS the Assigned Claims, the Company hereby ratifies and consents to AFS's assertion and continued prosecution of those Assigned Claims in AFS's name, in accordance with the terms of the assignments. The Company also acknowledges that it is bound to the rules of procedure and discovery which govern the Litigation and that the Company is and will be bound to the final outcome and adjudication of the Assigned Claims.

Also, in opposition to the motion, AFS contended that there was no federal or California law or public policy prohibiting the audit arrangements or claims assignments for which AFS and its clients had contracted. Ethics codes have long recognized the propriety of forensic auditing for a contingency fee, and both federal and California law recognized the enforceability of assignments of choses-in-action on a contingency basis. Moreover, AFS argued, to the extent these audit contracts might encourage the assertion of meritless claims or fabricated testimony by AFS audit personnel, the law of sanctions and rights of cross-examination afforded the proper and recognized remedies for such ills – not the dismissal of AFS's case before the merits of the case could be determined. In short, AFS argued that no basis existed to interfere with its rights and those of its clients to enter into lawful contracts or to preclude AFS's employees from testifying either as percipient or expert witnesses.[2]

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[2] AFS employees could be called to testify about the Prime Parties' actions in terminating the second audit, in Baltimore, which led to this litigation and to the facts uncovered by the audits. Some AFS employees could also testify as experts on, for example, auditing and industry customs with respect to CAM charges and lease reserves. While documentary evidence from the Prime Parties and from their vendors, together with testimony from independent experts retained specially for this litigation, could be used to prove most of AFS's case, still testimony from its employees could be indispensable. For example, if Prime

(Continued on following page)

While the district court acknowledged that the assignments and subsequent ratification by the clients sufficed to make AFS the owner and the real party in interest of the assigned claims for Rule 17(a) purposes (App., *infra* at 37a n.2), it nonetheless dismissed the claims on the grounds that the assignments were "champertous" under California law and constituted "witness contingency fee agreements." The court reasoned:

> The agreements between AFS and the tenants call for the application of California law. Under California law contingent fee witness agreements are clearly void as violative of public policy. . . . Therefore, the assignments fail unless the parties' contractual choice of law is to be disregarded.
>
> There is no reason that should be done. . . . I will assume that if the parties had not chosen the application of California law, Maryland would have provided the applicable law as to the state law claims and federal common law would have been applicable as to the RICO claims. Therefore, the question becomes whether it would be contrary to a fundamental policy of either Maryland or the United States to refuse to enforce a contract providing for payment of a contingent fee to a witness.
>
> AFS has pointed to nothing to suggest that is so. . . . [And in] *my judgment*, . . . [f]inancial arrangements that provide incentives for the falsification or exaggeration of testimony threaten the very integrity of the judicial process which depends upon the truthfulness of the witnesses.

Parties' witnesses denied that they abruptly terminated the second AFS audit, then testimony by AFS employees who communicated with Prime managers and employees at the time the audit was stopped would be necessary.

App., *infra* at 37a-40a (emphasis added) (citations and footnote omitted). Parenthetically, the district court offered the following elaboration of its holding – significant for present purposes:

> Perhaps I should add that if Maryland or federal common law were found to apply to the issue, I would hold that witness contingency fee agreements affirmatively violate the fundamental policy of Maryland and the United States. I recognize, as AFS argues, that firms providing auditing services to tenants in factory malls may provide an effective (and wholesome) deterrent to fraudulent billing practices by mall managers. *However, they can do so without entering into contingency fee agreements. Moreover, procedural devices, such as class actions and rules permitting joinder of claims, can assist in providing protection to defrauded tenants.*

App., *infra* at 40a n.3. The district court did not separately address federal public policy, except as noted above, and did not address at all AFS's arguments that cross-examination of its employees for self-interest and sanctions for prosecuting groundless claims would suffice to serve and protect whatever public interests – federal or state – are at stake here. Instead, the court ruled that even though the audit contracts were effective to convey to AFS title to the clients' claims, the contingent nature of the contracts rendered them "champertous" and thus unenforceable. On that basis, the district court held that AFS had no standing to prosecute the assigned claims. The court also dismissed AFS's non-assigned claims under 28 U.S.C. § 1367(c). AFS appealed.

D. The Court of Appeals' Majority Panel Decision

The *ratio decidendi* of the district court's decision was rooted in California law and the doctrine of champerty. "California, however, has never adopted the common law doctrine of champerty and maintenance." *Abbott Ford, Inc.*

v. Superior Court, 43 Cal. 3d 858, 885 n.26, 741 P.2d 124 (1987). Accordingly, on appeal, the Prime Parties argued that while California law applied to determine the validity of the claims assignments, it was not strictly the doctrine of champerty and maintenance that barred AFS from acting under the assignments, but instead California's prohibitions against contingent fee contracts for expert witnesses and similar, though less defined "policy considerations." Indeed, in their arguments to the court of appeals, the Prime Parties distanced themselves from the doctrine of champerty and maintenance, relying instead on rules of ethics prohibiting attorneys from paying witnesses for testimony on a contingent basis and prohibiting certified public accountants from performing "attestation" (as distinguished from forensic) audits for a contingent fee.

After briefing, oral argument, and post-argument supplemental briefing, the Fourth Circuit in a 2-1 decision – acting without argument or briefing by the parties and without notice or opportunity for AFS to be heard on the issue – held *sua sponte* that *Maryland* public policy trumped the contracting parties' choice of California law to govern their contracts and that, unlike California and "despite the law's metamorphosis, Maryland continues to reserve a policy against some of the originally prohibited conduct [i.e., conduct once prohibited in England as champerty and maintenance]." App., *infra* at 14a.

The majority also found that while Maryland, like most states, has determined that maintenance and its doctrinal cousins are obsolete, Maryland has still "reserved" a generalized prohibition of "officious meddling" to cause others to assert claims "which they have no right to make." App., *infra* at 15a. Ignoring that AFS's standing had been determined on a motion to dismiss and without any indication that the tenants had "no right to make" the claims AFS had asserted, the panel majority pointed to a 1908 Maryland statute which makes a misdemeanor of certain forms of "barratry." Although that statute, on its

face, does not apply to AFS's audit contracts (and the panel majority does not hold that it does), the panel reasoned that still the statute is indicative of a general policy in Maryland:

> [T]hrough surviving common law principles and statutory prohibition, the current fundamental public policy of Maryland prohibits schemes to stir-up and promote litigation for the benefit of the promoter rather than for the benefit of the real party in interest. Any contract violating this policy is void in Maryland and will not be enforced by its courts.

App., *infra* at 16a. Then, without disturbing the district court's holding that AFS was the lawful owner and real party in interest on the assigned claims and without citing a single case in which a Maryland court had invalidated an assignment of claims on grounds of the "strong" and "fundamental" policy articulated by the majority, the panel held that AFS's audit contracts violated the policy and therefore a Maryland court would disregard the parties' choice of California law and refuse to recognize the claims assignments they had made under that law.

Finally, as an "additional" ground for affirming the district court, the panel majority adopted the district court's ruling that AFS's standing to sue on the assigned claims was vitiated "[t]o the extent that AFS employees, as experts on the relationship between landlords and tenants in a commercial context, planned to testify regarding the allegations in this litigation." App., *infra* at 17a. Under the circumstances, according to the panel, "AFS [would be] offering expert testimony for a contingent fee. Such an arrangement would also violate public policy, as articulated more fully by the district court." App., *infra* at 17a-18a.

The court did not address – separately from the analyses just described – AFS's standing on the federal claims it had asserted as assignee. It did not explicitly discuss federal public policy at all. It either treated AFS's standing on the federal claims as a matter also controlled

by Maryland public policy or assumed that federal public policy was the same as Maryland's.

E. The Dissenting Opinion

The dissent pointed out that the majority had not followed Maryland law in determining whether a Maryland court would or would not disregard the contracting parties' choice of California law to control their contracts. App., *infra* at 22a. In fact, the panel majority reached the opposite conclusion on that issue from that reached by the district court. And the panel did not consider two of the three *conjunctive* factors required by Maryland choice-of-law precedents in deciding whether to disregard contracting parties' choice of law in favor of the forum's law. App., *infra* at 22a-28a. As to the one factor the panel majority did address, it was, according to the dissent, plainly wrong in its analysis. App., *infra* at 24a-26a. On this point, the dissent carefully explains why the audit contracts in this case do not violate Maryland's barratry statute or "whatever is left of the doctrines of champerty, maintenance and barratry in Maryland[,]" (App., *infra* at 28a-29a) or even the more general public policy prohibition articulated by the panel majority. App., *infra* at 29a-32a.

Moreover, the dissent demonstrates that Maryland law and pronouncements of public policy are not so "expressly stated" or "explicitly determined" as to allow a federal court to conclude that the contractual arrangements between AFS and its clients were contrary to Maryland public policy, let alone such "strong" and superceding policy as to trump the parties' choice of California law:

> [T]he majority takes an unprecedented step [and] restricts [contracting parties'] right to contract. . . . The state of Maryland does not have any fundamental policy or law that dictates this result. *Cf.*, *U.S. Const.* Art. I, § 10. ("No State shall . . . pass any . . . law impairing the Obligation of Contracts."). Today's decision also means

> that AFS is barred from suing on the assigned claims that it legitimately owns.

App., *infra* at 32a.

Finally, the dissent addresses the panel majority's ruling that the contracts in question were contingent fee contracts for expert witnesses:

> AFS was hired as an auditor, and any claims uncovered in the audit are assigned to AFS. . . . [T]hese contracts transfer the claims to AFS and provide that AFS will sue in its own name, control the litigation, and pay all litigation costs, [and thus] they are true assignments. AFS is therefore the real party in interest, and [like any other plaintiff] it may offer the testimony of its own people without violating any public policy against supplying expert testimony for a contingent fee.

App., *infra* at 33a.[3]

F. AFS's Petition for Rehearing and Motion to Certify Questions of Maryland Law and Policy to the Maryland Court of Appeals

On its petition for rehearing, AFS faced an unusual circumstance: As explained *supra*, the district court had held that Maryland would *not* disregard California law, the law chosen by AFS and its clients to govern their contracts, and neither AFS nor the Prime Parties appealed that ruling, yet the panel majority ruled *sua sponte* that Maryland instead of California law and public policy applied here. In its petition for rehearing, AFS emphasized

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[3] As seen below, one court, in the Seventh Circuit, has already found different but equally fundamental grounds for disagreeing with the panel majority on this issue.

this circumstance and argued the merits of the choice-of-law-issue. But the petition also underscored the federalism and freedom-of-contract issues which had not been addressed by the panel majority:

> The Supreme Court has emphasized that articulating public policy is, absent congressional action, left by the Constitution to the States' legislatures. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 691-92 [1981]. It is not to be determined *ad hoc* by judges, no matter how well-meaning.

App., *infra* at 66a. AFS's petition then relied on the dissenting opinion's analysis of Maryland law to demonstrate that the panel majority had formulated Maryland public policy, rather than merely recognizing and applying previously explicit pronouncements of such policy.

Finally, noting that the opportunity to do so had not arisen earlier in the litigation, AFS asked the court of appeals to certify under Maryland Law & Judicial Code § 12-603 the questions of Maryland law and public policy presented by this case. *See* App., *infra* at 82a-83a. Other circuits have granted rehearing *en banc* for the express purpose of invoking such certification procedure even though certification had not been sought earlier. *See, e.g., Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (*en banc*); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1329 (5th Cir. 1985).

As mentioned, the petition for panel rehearing was denied, and the petition for rehearing *en banc* was denied upon a 6-4 vote of the active and participating judges of the court of appeals. The motion to certify questions of state law and public policy to the Maryland Court of Appeals was also denied, without explanation or comment.

REASONS FOR GRANTING THE PETITION

A. THERE IS A NEED TO CLARIFY THE LIMITS OF THE FEDERAL COURTS' POWER TO DETERMINE PUBLIC POLICY AND IN CHOOSING THE MEANS TO ENFORCE IT.

1. The Lower Courts Barred AFS from the Courthouse and Barred AFS's Employees from the Witness Stand on Grounds Explicitly Rejected by Other Federal Courts.

In a case decided four months after the court of appeals' decision in this case, *In re Joy Recovery Technology Corp.*, 286 B.R. 54 (Bankr. N.D. Ill. 2002), the court rejected the Fourth Circuit's holding in this case about contingent fee witnesses:

> Appellant relies on authority from the Fourth Circuit which has held that contingent witnesses are forbidden under common law. *See Accrued Financial Services, Inc. v. Prime Retail, Inc.*, 298 F.3d 291, 2002 WL 1733743 at *7 (4th Cir.).
>
> There is nothing in the rules of evidence that bars testimony from contingent fee experts. However, under Fed. R. Evid. 601 the fact finder may discount the credibility of such witnesses. . . . The notion that [the expert's] testimony is inherently unreliable confuses an ethical rule with [an] evidentiary rule, and is contrary to the authority in [the Seventh] Circuit.

286 B.R. at 69. Federal Rule of Evidence 601, in effect, abolishes common law grounds for finding a witness incompetent to testify, such as lack of religious belief, conviction of a crime, or connection with the litigation as a party, interested person, or spouse of a party. Fed. R. Evid. 601 advisory committee's note. The antiquated rules of competency were essentially legal formulations of credibility. J.M. Moore, *Congress, Evidence and Rule-Making,* 84 Yale L.J. 9, 28-29 (1974). "'As restrictions on competency have retreated, the old disqualifying items have come in

on the question of credibility.'" *Id.* (quoting James, *Witnesses: A Discussion of the Proposed Federal Rules of Evidence Before the Annual Judicial Conference of the Second Circuit,* 48 F.R.D. 58, 59 (1969)).

The lower courts in this case, however, recognized a new basis for witness preclusion – compensation to an expert witness contingent on the outcome of a case – a ground not previously recognized in the federal courts as far as AFS can discern. While this Court recognized in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) the important gatekeeper function of the federal trial courts in the admission of expert testimony, the role assumed by the lower courts in this case in protecting the truth-seeking process may well exceed what this Court contemplated.

Moreover, the remedy of barring AFS from suing and banning its employees from testifying raises serious questions about the lower courts' power to first recognize and then implement public policies that negate the otherwise proper standing of a litigant to sue under an otherwise valid contract and to foreclose testimony by otherwise competent witnesses based upon perceived threats to the fact-finding process.

This Court has not addressed the power of a trial court to preclude witnesses from testifying on grounds that their testimony is so tainted by self-interest or otherwise that cross-examination will not suffice, nor has the Court delineated the authority and discretion of federal courts to "gatekeep" the testimony the trier of fact considers, other than in the context addressed by *Daubert*.

2. The Decisions Below Are Part of a Body of Lower Court Decisions Marked by Uncertainty as to How Public Policy Is to Be Determined and Applied by Federal Courts in the Absence of Congressional Action.

Two of the nine assigned claims for relief which were dismissed below for lack of standing were federal claims.

AFS's standing to assert those claims should have been determined under federal law. *Ryan v. Brown*, 227 F.3d 1042, 1045 (7th Cir. 2000) ("[T]he question of standing for RICO purposes is indeed a federal one that must be resolved by reference to federal law.").

Federal courts have recognized that claims under the federal RICO statute, such as those asserted in this case, are freely assignable. *National Asbestos Workers Med. Fund v. Phillip Morris, Inc.*, 74 F. Supp. 2d 221, 228 (E.D.N.Y. 1999), *appeal dismissed*, 229 F.3d 1135 (2d Cir. 2000); *In Re National Mortgage Equity Corp. Mortg. Pool Certificates SEC Lit.*, 636 F. Supp. 1138, 1156 (C.D. Cal. 1986). And at no time have the Prime Parties contended that any federal public policy would preclude the assignment to AFS of the RICO claims asserted here – under the contractual terms in the audit contracts in question. Although the district court mentioned in passing that, if presented with the issue, it would hold that these audit contracts were violative of federal policy, it did not point to any legislative or decisional basis for such holding. And the court of appeals did not discuss federal public policy at all.

While the failure to apply federal law and policy to determine AFS's standing to prosecute federal claims is error, the issue the error represents is not itself worthy of consideration on certiorari, because the applicability of federal law and policy to the issue is well-settled, and no substantial conflict on the question exists. This is not to say, however, that the error by the courts below in failing to apply federal law to determine AFS's standing to sue on the federal claims should go uncorrected. But the correction can and should come under the "fairly comprised" rule, whereby this Court may address questions not explicitly included in a grant of certiorari if such questions are "essential to analysis" of the decisions below or "to the correct disposition of the other issues on which certiorari has been granted." *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978); *see also Kolstad v. American Dental*

Ass'n, 527 U.S. 526, 540 (1999). Of course, this presumes that the other rulings below *are* worthy of review by this Court. AFS submits that they are.

In *Muschany v. United States,* 324 U.S. 49, 66 (1945), this Court held that "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." (citing *Vidal v. Philadelphia,* 2 How. 127, 197-98.) The *Muschany* Court noted that "the term 'public policy' is vague" and therefore courts should locate "definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy." *Id.*

The *Muschany* Court also held that "it is Congressional enactments which determine public policy," and in "the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts . . . contrary to public policy. The courts must be content to await legislative action." 324 U.S. at 67-68 (footnote omitted); *see also Allied Erecting & Dismantling Co. v. USX Corp.,* 249 F.3d 191, 197 (3d Cir. 2001); *American Casualty Co. v. Federal Deposit Ins. Corp.,* 39 F.3d 633, 638 (6th Cir. 1994).

In this case, however, the parties could point to no congressional enactments or long-standing practices in the federal courts from which federal public policy on the issues presented might be determined. And the contracts in question did not violate "obvious ethical or moral standards." Yet both the district court and the panel majority of the appeals court were troubled by the arrangement AFS had made with its audit clients and the potential consequences of those arrangements, either in spawning unwarranted litigation or in encouraging fabricated testimony. Did those concerns and the admittedly special relationship between the federal courts and the adjudicatory processes they supervise empower those courts to make the "policy" judgments they did? Were these courts authorized to decide that instead of the

arrangements the tenants made with AFS, they should have kept their claims and used joinder or class action devices to prosecute them?

AFS submits that this case presents squarely important issues of judicial power and restraint and underscores the need for further guidance of the lower courts in exercising that power and in honoring that restraint.

B. THERE IS A NEED TO DECLARE THAT THE FEDERAL COURTS' DISCRETION IN CHOOSING HOW TO DETERMINE STATE LAW IS SUBJECT TO LIMITS AND TO PROVIDE GUIDANCE ON HOW THAT DISCRETION SHOULD BE EXERCISED.

Neither the federal courts nor Congress are empowered to "declare substantive rules of common law applicable in a State." *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). Yet, in diversity and supplemental jurisdiction cases, federal courts are called upon to apply state law. And when such law is in doubt, they must have some means for resolving the doubt or must abstain. Essentially, four methodologies by which federal courts deal with issues of uncertain state law have emerged.

Under the so-called "status quo" and "predictive" approaches, federal courts determine uncertain state law based on their interpretation of that law – either as it has existed or as the federal court thinks it may have evolved or predicts it will evolve. Under the other two approaches, *Erie*-based abstention and certification, federal courts refrain from answering unresolved questions of state law or policy, leaving such questions for the state's courts.

With the exception of *Erie*-based abstention, federal courts presently navigate among these options with little, if any, guidance as to when one option should be chosen over the others. This has resulted not only in inconsistency in how federal courts resolve similar or the same state law issues under indistinguishable circumstances, but also

inconsistency in the substantive state law the federal courts apply.

1. Some Federal Courts Determine and Apply State Law Using a Predictive or "Status Quo" Approach with Little or No Enunciated Rationale for Doing So.

Many lower federal courts follow the predictive approach despite the observation by commentators and judges alike that the approach too often perpetuates uncertainty and thwarts the judicial federalism underlying *Erie*. *See generally* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459 (1997) ("Clark"); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671 (1992) ("Sloviter"). This Court has not conclusively endorsed the predictive approach or explained when it is the appropriate means by which a federal court may determine genuinely uncertain state law. To be sure, this Court's opinions suggest that prediction is acceptable in at least some cases and make clear that independent judgment by federal judges is never acceptable. *See, e.g., West v. AT&T Co.*, 311 U.S 223, 237 (1940) (holding that the "rule of law" announced by an intermediate appellate state court "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise"); *see also Meredith v. Winter Haven*, 320 U.S. 228, 233-35 (1943); *Salve Regina College v. Russell*, 499 U.S. 225, 241 (1991) (Rehnquist, C.J., dissenting). But the limits of the predictive approach and whether there are cases in which the approach is inappropriate have not yet been addressed definitively by this Court.

Even with a wealth of state law resources at their disposal in some cases, federal courts not infrequently fail to accurately predict the development of state law. *See,*

e.g., *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y.), *rev'd*, 836 F.2d 103 (2d Cir. 1987); *DeWeerth v. Baldinger*, 804 F. Supp. 539 (S.D.N.Y.), *rev'd*, 38 F.3d 1266 (2d Cir. 1994) (providing an unsettling example of the predictive approach interfering with the constitutional autonomy and independence of state courts and resulting in unequal application of state law); *see also generally United Services Life Ins. Co. v. Delaney*, 328 F.2d 483, 485-89 (*en banc*) (5th Cir. 1964) (J. Brown, concurring) (bemoaning the many incorrect *Erie* guesses of the Fifth Circuit and arguing for increased use and availability of the certification process); Sloviter, 78 Va. L. Rev. at 1679 (pointing out that "[d]espite our best efforts to predict the future thinking of the state supreme courts within our jurisdiction on the basis of all of the available data, [federal judges in the Third Circuit] have guessed wrong" in a "not insignificant number" of cases).

There is also a threat to federalism in the sheer influence of a federal court's decision upon subsequent state court decisions – whether the state courts are more apt to follow or more apt to reject the federal court's prior predictions of state law. Undeniably, speaking first on an issue may constitute more "leading" and less the kind of "following" that true federalism contemplates.

Perhaps responding to this Court's continuing emphasis on cooperative judicial federalism,[4] a growing number of lower federal courts have turned to the status quo approach. These courts assert that their role is to rule upon undecided state law issues based solely "upon state

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[4] *See, e.g.*, *Salve Regina College v. Russell*, 499 U.S. 225, 233-34 (1991) (noting that appellate deference to district court determinations of state law was not warranted by the exercise of diversity jurisdiction and was actually inconsistent with the principles of cooperative judicial federalism underlying *Erie*); *see also* Michael C. Dorf, *Prediction and the Rule of Law*, 42 U.C.L.A. L. Rev. 651, 706 (1995) (asserting that, to some extent, this Court's reaffirmation of judicial federalism principles in *Russell* undercuts the predictive approach to federal court determinations of state law).

law as it presently exists and not to surmise or suggest its expansion." *Garst v. Tritle*, 928 F.2d 81, 84 (4th Cir. 1990) (internal citations omitted); *see also Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694 (1st Cir. 1984) ("We must apply the law of the forum as we infer it presently to be, not as it might come to be."). Under this approach, federal courts refuse to recognize or apply novel or emerging principles, such as a new cause of action or defense. These courts acknowledge their lack of "power to declare substantive rules of common law applicable in a State" (*Erie*, 304 U.S. at 78) and that only "the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (citing *Erie*, 304 U.S. 64 (1938)).

Some commentators refer to this as the "static" approach to determining state law. *See, e.g., Clark*, 145 U. Pa. L. Rev. at 1463-65 (noting that the static approach avoids both the judicial federalism concerns raised by the predictive approach and the separation-of-powers concerns associated with abstention but potentially increases the danger of forum-shopping). Arguably, however, at least in some cases, the static or status quo approach is also less accurate in its results than a reasonable assessment of state-law trends and a cautious prediction of what the state's highest court would say today, rather than what it said perhaps long ago, on a question of state law.

The status quo methodology is of course still "predictive." It is just that the prediction by a *status quo* court is an assumption (or a nearly irrebutable presumption) that the highest court of the state would adhere to prior law and reject a new or different rule or would refuse to adopt a principle not previously recognized. Ultimately, though, predicting that state law on an issue will remain what it has been rather than becoming what it might is as much an incursion into state sovereignty as predicting that the state would adopt a more "modern" or "enlightened" view than that expressed previously by the state's courts. The

predictive and status quo approaches may differ in judicial philosophy, but in substance do not differ in their consequences to federalism or comity.

Some courts have increasingly looked to their other options for resolving issues controlled by unsettled or undeveloped state law.

2. This Court Has Not Yet Articulated Standards to Determine When a Federal Court Should Exercise Its Discretion to Certify a Question of State Law or Policy to State Court, And Use of Certification by Federal Courts Is Inconsistent.

This Court has, at times, permitted or even required federal courts to abstain altogether from hearing indeterminate questions of state law or policy. *See, e.g., Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483-84 (1940) (directing submission of a state property law question to the Illinois state courts in the absence of "clearly applicable" state statutes and decisions); *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) (concluding that "a sound respect for the independence of state action requires the federal equity court to stay its hand"); *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (reinstating a stay of a district court proceeding pending resolution by a Louisiana state court of an eminent domain issue, emphasizing that eminent domain "is intimately involved with sovereign prerogative" and abstention in such cases "reflects a deeper policy derived from our federalism"). However, this Court has also indicated that refusing to retain and ultimately to exercise federal jurisdiction pending a decision by a state court under an available certification procedure may be improper. *See Arizonians*

for Official English v. Arizona, 520 U.S. 43, 75 (1997); *Belloti v. Baird*, 428 U.S. 132, 146-7, 150-51 (1976).[5]

In *Lehman Brothers v. Shein*, 416 U.S. 386 (1974), this Court "for the first time expressed its view as to the use of certification procedures by federal courts." 416 U.S. at 395 (Rehnquist, J., concurring). There, this Court vacated a judgment of the Second Circuit "so that court may reconsider whether [a] controlling issue of [state] law" should be certified to the highest court of the state. 416 U.S. at 391-92. In so doing, the Court noted: "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory . . . . Its use in a given case rests in the sound discretion of the federal court." 416 U.S. at 390-91. *Lehman*, however, left open the questions of whether, and if so under what circumstances, a federal court might abuse that discretion and whether, in effect, certification might indeed be "obligatory" in some cases.

The concurrence in *Lehman* emphasized the "considerable discretion" that the federal courts have in deciding to use the certification procedure: "If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." 416 U.S. at 395. That suggests, however, that there might be cases where refusal to certify state-law questions might indeed be "disturbed"

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[5] While in this litigation there was a state-court action pending, in Queen Anne's County, Maryland (*see* App., *infra* at 77a), at the time the federal court of appeals *sua sponte* ruled that Maryland public policy controlled the issues before it, abstention in the circumstances would have been discretionary. Clearly, though, certification was and is preferable to abstention, given that the issues presented below were issues of law and policy not requiring factual development in a trial court.

– where more than the mere availability of a certification procedure counsels certification. Arguably implying this to be the case, the *Lehman* concurrence observed:

> The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them. . . . [O]ur decisions have dealt with the issue of how to reconcile the exercise of the jurisdiction which Congress has conferred upon the federal courts with the important considerations of comity and cooperative federalism which are inherent in a federal system, *both of which must be subject to a single national policy within the federal judiciary.*

416 U.S. at 393 (emphasis added).

In the nearly 30 years since *Lehman*, this Court has overturned court of appeals' decisions for failing to certify only in cases where the certification was effectively mandated by *Pullman* abstention. *See, e.g., Arizonians for Official English v. Arizona*, 520 U.S. 43, 75-76 (1997); *Belloti v. Baird*, 428 U.S. 132, 146-7, 150-1 (1976). However, similar concerns are raised by *Erie*-based abstention, and this Court has yet to address the additional circumstances, if any, in which a lower federal court may be deemed to have abused its discretion for failing to certify state law questions. Due to the near universal availability of certification procedures in state courts today (*see* 17A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4248 (2d ed. 1988 and Supp. 1996) (listing all 46 states that have adopted certification statutes and procedures to date), AFS submits that now is the time and this is the case to address the issue.

Illustrating the propriety and need for review on the question presented here is the contrast between the decision by the circuit court in this case and the Ninth

Circuit's decision in *Alaska Airlines, Inc. v. United Airlines, Inc.*, 902 F. 2d 1400 (9th Cir. 1990). There, the federal court faced the question of whether a statute of Alaska (the forum) providing for pre-judgment interest and attorneys' fees should be applied rather than Illinois law, which the parties' contractually chose to govern their agreement. The federal appeals court *sua sponte* certified three questions of Alaska law to the Alaska Supreme Court. Significantly, the Alaska substantive law at issue was clear, but the question of whether the state's public policy reflected by the law was "so fundamental as to override an otherwise valid choice of law provision is a close one." *Id.* at 1402 n.1. On that basis, and because "the issue is important to Alaska in terms of comity," the federal court certified the questions even though no party had requested certification. *Id.*

The case for certification here was (and is) considerably stronger than it was in *Alaska Airlines*. While in that case, the substantive law in question was clear and only the strength of the state's public policy was in question, here the law or policy is itself far from clear, and whether in this case the purported policy is sufficiently fundamental to override a choice of law provision is at least as uncertain as it was in *Alaska Airlines*. Moreover, in terms of comity, if Maryland has a fundamental policy precluding the kind of contracts at issue here, its interests in such policy would be at least as important as Alaska's interest in regulating awards of attorneys' fees and pre-judgment interest. The refusal to certify in this case and the certification made in *Alaska Airlines* demonstrate that the "single national policy within the federal judiciary," which the *Lehman* concurrence said was essential to cooperative federalism is sorely lacking.

Underscoring further the need for guidance by this Court, the district court and the court of appeals here each utilized the predictive approach to the same case and issues and reached opposite conclusions about whether the contracting parties' choice-of-law would be respected. The

court of appeals also predicted that a Maryland court would find that AFS's contracts with its clients were a prohibited scheme that would "stir up" litigation and primarily on that basis banned AFS from proceeding, while the district court felt it was the threat to the truth-seeking process that was repugnant to California, Maryland and federal public policy.

This case is a prime example of the usurpation of state sovereignty which *Erie* prohibited. The court of appeals "distilled" from obscure and uncertain sources, a state's public policy. The court not only incorrectly applied what law did exist regarding the policy at issue (see discussion, *infra*), it broadened and expanded enunciated policies without a clear mandate from the state. This is a case which squarely presents the issue of whether the lower court's discretion in deciding whether to employ an available certification procedure is subject to limits and to articulate what those limits are.

C. THE DECISION BELOW IS INCORRECT.

The court of appeals erred in failing to apply federal law to determine AFS's standing to sue on federal claims. It also erred in its application of Maryland conflicts law in determining that the contracting parties' choice of California law would be disregarded by a Maryland court. *See especially* App., *infra* at 22a-28a. As the dissent observed:

> '[M]erely because Maryland law is dissimilar to the law of another jurisdiction does not render the latter contrary to Maryland public policy.' . . . [A]s far back as 1868 the Court of Appeals of Maryland noted that 'the common law notion of maintenance, as applicable to the assignments of rights of action, had become practically obsolete.' . . . Accordingly, no strong public policy against the California law allowing the assignments in this case can be gleaned from whatever, if anything, might remain of the common law doctrines

> of maintenance, champerty, and barratry in Maryland.

App., *infra* at 24a-25a.

Further, the panel majority erred in concluding that the audit contracts here would violate any of the public policies which the panel articulated. First, because AFS cannot earn compensation under the audit contracts unless it finds overcharges during the audit, its incentive to find overcharges and, according to the majority, to "trump up" claims and "stir up" litigation arises not from the assignments of the tenants' claims but from the audit itself. Indeed, the mischief which the panel condemned is possible even if AFS took no assignment of the claims but was compensated contingently from what the tenants recovered. Thus, the inescapable point of the majority holding is that it is forensic auditing, not claims assignments or expert testimony, for a contingent fee which is contrary to public policy. However, even if AFS were held to the standards of a certified public accounting firm, its mode of business would be proper. Since 1990, and as a result of action by the Federal Trade Commission, standards of the AICPA have expressly recognized the propriety of doing forensic audits for a contingency fee. *See* AICPA Professional Standards, §§ 100.01-05 and related commentary; *see also* D. Edward Martin, *Attorneys Handbook of Accounting, Auditing and Financial Reporting*, § 16.01[2] at 16-8 (2000). No contrary federal, California, or Maryland statute, professional rule, case or other authority has been unearthed despite an exhaustive search. *See especially and compare, Bell County Bd. of Ed. v. Lee*, 39 S.W.2d 492, 493 (Ky. 1931).

Second, to the extent the panel majority relies on Maryland's "barratry" statute, the panel necessarily assumes that AFS's contracts with its tenants are part of a scheme to propagate not only litigation but spurious litigation. That is an assumption improper on a motion to dismiss and furthermore is inconsistent with the unrefuted facts in the record below. *See* App., *infra* at 28a-29a.

Third, the majority reasons that under the audit contracts, the decision to sue is made by AFS unfettered by the tenants' judgment (except for the tenants right to cancel the audit contract) and that the decision is made *solely* for AFS's benefit. That conclusion too overlooks the facts: (i) that in this case the tenants *did* exercise their judgment that the assigned claims should be pursued *after* the audit and indeed *after* AFS had commenced suit, as the tenants ratified the assignments in the district court; (ii) that the cancellation right, like the other terms of the agreement, was bargained for by sophisticated business people hardly in need of the special protections of federal courts articulating public policy; and (iii) that the tenants receive between 50% and 60% of the net amount recovered on the assigned claims without incurring any litigation expense, inconvenience, or risk whatsoever – hardly a "scheme[ ] to promote litigation for the benefit of [AFS] *rather* than for the benefit of the [tenant] or the public." App., *infra* at 16a (emphasis added). Unless one assumes that AFS is acting in bad faith, again an inappropriate conclusion on a motion to dismiss, the panel majority overlooked the benefit to the tenants and to the public in ferreting out overreaching and fraud.

Lastly, the majority's conclusion that the audit contracts provide for contingent witness fees ignores that AFS is the legitimate owner of the claims and, like any other plaintiff, can call its own employees to testify as either percipient or expert witnesses regardless of AFS's stake in the outcome of the case. *See also* App., *infra* at 32a-33a.

For all these reasons, the court of appeals decision is wrong on rulings that were outcome determinative below.

CONCLUSION

While to some the lack of judicial restraint and the result-driven character of the lower court's decisions in this case may be transparent, that circumstance has been present in other – perhaps many – cases this Court has

reviewed on certiorari. The lower courts' apparent disregard for limitations on the power of courts in general and federal courts in particular to determine and to apply public policy and their inadequate regard for the rule of law over the *ad hoc* judgment of individual judges does not detract from the clarity and certainty with which this case frames the issues on which review is sought. What the lower courts did and *how* they did it – and what they refused to do – is evident. And the relative obscurity of the substantive issues presented makes this case an especially appropriate vehicle for the Court to clarify the principles of judicial federalism and judicial restraint which should have governed the lower courts. The issues presented for review are important, concretely presented and ripe for decision by this Court.

Respectfully submitted,

RODNEY R. PATULA
Counsel of Record

Nos. 00-1971, 01-1231

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ACCRUED FINANCIAL SERVICES, INCORPORATED,
for itself and as assignee of claims,
Plaintiff-Appellant,

v.

PRIME RETAIL, INCORPORATED; PRIME RETAIL, L.P.; PRIME RETAIL FINANCE, INCORPORATED; PRIME RETAIL FINANCE II, INCORPORATED; PRIME RETAIL FINANCE V, INCORPORATED; ARIZONA FACTORY SHOPS PARTNERSHIP; BEND FACTORY OUTLETS LIMITED PARTNERSHIP; BUCKEYE FACTORY SHOPS LIMITED PARTNERSHIP; CAROLINA FACTORY SHOPS LIMITED PARTNERSHIP; CASTLE ROCK FACTORY SHOPS PARTNERSHIP; CORAL ISLE FACTORY STORES LIMITED PARTNERSHIP; FLORIDA KEYS FACTORY SHOPS LIMITED PARTNERSHIP; GAINESVILLE FACTORY SHOPS LIMITED PARTNERSHIP; GROVE CITY FACTORY SHOPS PARTNERSHIP; GULF COAST FACTORY SHOPS LIMITED PARTNERSHIP; GULFPORT FACTORY SHOPS LIMITED PARTNERSHIP; HAGERSTOWN FACTORY SHOPS LIMITED PARTNERSHIP; HUNTLEY FACTORY SHOPS LIMITED PARTNERSHIP; INDIANAPOLIS FACTORY SHOPS LIMITED PARTNERSHIP; KANSAS CITY FACTORY OUTLETS LIMITED PARTNERSHIP; LATHAM FACTORY STORES LIMITED PARTNERSHIP; OUTLET VILLAGE OF LEBANON LIMITED PARTNERSHIP; LOVELAND FACTORY SHOPS LIMITED PARTNERSHIP; MAGNOLIA BLUFF FACTORY SHOPS LIMITED PARTNERSHIP; MARKET STREET LIMITED; NEBRASKA CROSSING FACTORY SHOPS LIMITED PARTNERSHIP;

NIAGARA INTERNATIONAL FACTORY OUTLETS LIMITED PARTNERSHIP; OAK CREEK FACTORY OUTLETS LIMITED PARTNERSHIP; OHIO FACTORY SHOPS PARTNERSHIP; OUTLET VILLAGE OF KITTERY LIMITED PARTNERSHIP; OXNARD FACTORY OUTLET PARTNERS; FACTORY OUTLETS AT POST FALLS LIMITED PARTNERSHIP; SAN MARCOS FACTORY STORES LIMITED; SHASTA OUTLET CENTER LIMITED PARTNERSHIP; TRIANGLE FACTORY STORES LIMITED PARTNERSHIP; HORIZON GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated; HORIZON GROUP PROPERTIES, INCORPORATED; HORIZON GROUP PROPERTIES, L.P.; FIRST HGI, INCORPORATED; SECOND HGI, INCORPORATED; THIRD HGI, L.L.C.; HGI PERRYVILLE, INCORPORATED, a/k/a Prime Outlets At Perryville Limited Partnership; HORIZON/GLEN OUTLET CENTERS LIMITED PARTNERSHIP, a/k/a Prime Retail, L.P.; FIRST HORIZON GROUP LIMITED PARTNERSHIP; SECOND HORIZON GROUP LIMITED PARTNERSHIP; THIRD HORIZON GROUP LIMITED PARTNERSHIP; H/G PERRYVILLE LIMITED PARTNERSHIP, a/k/a Prime Outlets At Perryville Limited Partnership; FINGER LAKES OUTLET CENTER, L.L.C.; HORIZON/GLEN GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated, Defendants-Appellees.

ACRUED FINANCIAL SERVICES, INCORPORATED, for itself and as assignee of claims,

Plaintiff-Appellant,

v.

PRIME RETAIL, INCORPORATED; PRIME RETAIL, L.P.; PRIME RETAIL FINANCE, INCORPORATED; PRIME RETAIL FINANCE II, INCORPORATED; PRIME RETAIL

FINANCE V, INCORPORATED; ARIZONA FACTORY SHOPS PARTNERSHIP; BEND FACTORY OUTLETS LIMITED PARTNERSHIP; BUCKEYE FACTORY SHOPS LIMITED PARTNERSHIP; CAROLINA FACTORY SHOPS LIMITED PARTNERSHIP; CASTLE ROCK FACTORY SHOPS PARTNERSHIP; CORAL ISLE FACTORY STORES LIMITED PARTNERSHIP; FLORIDA KEYS FACTORY SHOPS LIMITED PARTNERSHIP; GAINESVILLE FACTORY SHOPS LIMITED PARTNERSHIP; GROVE CITY FACTORY SHOPS PARTNERSHIP; GULF COAST FACTORY SHOPS LIMITED PARTNERSHIP; GULFPORT FACTORY SHOPS LIMITED PARTNERSHIP; HAGERSTOWN FACTORY SHOPS LIMITED PARTNERSHIP; HUNTLEY FACTORY SHOPS LIMITED PARTNERSHIP; INDIANAPOLIS FACTORY SHOPS LIMITED PARTNERSHIP; KANSAS CITY FACTORY OUTLETS LIMITED PARTNERSHIP; LATHAM FACTORY STORES LIMITED PARTNERSHIP; OUTLET VILLAGE OF LEBANON LIMITED PARTNERSHIP; LOVELAND FACTORY SHOPS LIMITED PARTNERSHIP; MAGNOLIA BLUFF FACTORY SHOPS LIMITED PARTNERSHIP; MARKET STREET LIMITED; NEBRASKA CROSSING FACTORY SHOPS LIMITED PARTNERSHIP; NIAGARA INTERNATIONAL FACTORY OUTLETS LIMITED PARTNERSHIP; OAK CREEK FACTORY OUTLETS LIMITED PARTNERSHIP; OHIO FACTORY SHOPS PARTNERSHIP; OUTLET VILLAGE OF KITTERY LIMITED PARTNERSHIP; OXNARD FACTORY OUTLET PARTNERS; FACTORY OUTLETS AT POST FALLS LIMITED PARTNERSHIP; SAN MARCOS FACTORY STORES LIMITED; SHASTA OUTLET CENTER LIMITED PARTNERSHIP; TRIANGLE FACTORY STORES LIMITED PARTNERSHIP; HORIZON GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated; HORIZON GROUP

PROPERTIES, INCORPORATED; HORIZON GROUP PROPERTIES, L.P.; FIRST HGI, INCORPORATED; SECOND HGI, INCORPORATED; THIRD HGI, L.L.C.; HGI PERRYVILLE, INCORPORATED, a/k/a Prime Outlets At Perryville Limited Partnership; HORIZON/GLEN OUTLET CENTERS LIMITED PARTNERSHIP, a/k/a Prime Retail, L.P.; FIRST HORIZON GROUP LIMITED PARTNERSHIP; SECOND HORIZON GROUP LIMITED PARTNERSHIP; THIRD HORIZON GROUP LIMITED PARTNERSHIP; H/G PERRYVILLE LIMITED PARTNERSHIP, a/k/a Prime Outlets At Perryville Limited Partnership; FINGER LAKES OUTLET CENTER, L.L.C.; HORIZON/GLEN GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated,

Defendants-Appellees.

October 30, 2001 Argued

July 29, 2002 Decided

COUNSEL:

ARGUED: Rodney R. Patula, SQUIRE, SANDERS & DEMPSEY, L.L.P., San Francisco, California, for Appellant.

Charles Preston Scheeler, PIPER, MARBURY, RUDNICK & WOLFE, L.L.P., Baltimore, Maryland, for Appellees.

ON BRIEF: Diane L. Gibson, SQUIRE, SANDERS & DEMPSEY, L.L.P., San Francisco, California, for Appellant.

Glen K. Allen, PIPER, MARBURY, RUDNICK & WOLFE, L.L.P., Baltimore, Maryland, for Appellees.

JUDGES:

Before NIEMEYER, WILLIAMS, and MICHAEL, Circuit Judges. Judge Niemeyer wrote the majority opinion, in which Judge Williams joined. Judge Michael wrote a dissenting opinion.

OPINION BY:
NIEMEYER

OPINION:

NIEMEYER, Circuit Judge:

The district court declined to enforce, as void against public policy, contracts and related assignments between Accrued Financial Services, Inc. ("AFS") and its clients, who were tenants in outlet shopping malls. The contracts provided that AFS would conduct audits of the tenants' leases with their landlords and retain 40-50% of any discrepancy that AFS would discover and collect for the tenant. As part of the arrangement, the tenant assigned to AFS exclusive control of all potential legal claims that the tenant might have against the landlord. The district court concluded that the contractual arrangements were "champertous" and that they violated Maryland's public policy against private parties' "contingent fee witness agreements." For the reasons that follow, we affirm.

I

Accrued Financial Services, Inc. is a California corporation engaged in the business of conducting lease audits for tenants in commercial buildings and factory outlet malls. It is paid by retaining a percentage of the "discrepancies" that it discovers and collects as a result of its

audits. As part of its arrangement with client-tenants, AFS requires that the tenant assign to AFS all legal claims that the tenant has against the landlord and give AFS control over any litigation that AFS might wish to initiate to enforce the claims.

The relationship is typically documented by a "Letter of Agreement Regarding Leased Locations" and an "Assignment of Cause of Action." In the Letter of Agreement, the tenant authorizes AFS "to serve as sole and exclusive representative" of the tenant for the purpose of reviewing the lease relationship and appoints AFS "to contact, negotiate, and settle with Clients' landlords" any overcharge discovered by AFS. The tenant also gives AFS authority to pursue collection of any overcharge, which the agreement refers to as a "Discrepancy," using "its normal collection practices," including authority "to file all lawsuits under AFS's name as plaintiff" and "full discretion [after consultation with the tenant] to accept or reject any settlement or other disposition." Finally, under the Letter of Agreement, the tenant authorizes AFS to retain as its fee 40-50% of any "discrepancy" discovered and collected. If the tenant chooses not to pursue the discrepancy, the tenant must pay AFS 40% of the discrepancy "as a Cancellation fee for providing Client [tenant] with valuable information and services."

The Assignment of Cause of Action, executed in connection with the Letter of Agreement, provides that the tenant assigns to AFS "any and all causes of action [tenant] may have" against its landlord "arising solely from periodic (including annual) charges of any type whatsoever made by or on behalf of the Landlord." The Assignment provides that AFS "may adjust, compromise, or settle the assigned cause of action at its reasonable discretion." AFS

retains as a commission 40-50% of the net recovery, defined to be the total recovery less attorneys fees and litigation costs. The Assignment provides that it is "governed by and construed in accordance with the laws of California."

Pursuant to a particular Letter of Agreement and Assignment, AFS conducted audits at two large factory outlet malls, one in Michigan, owned by Horizon Group, Inc., and the other in Baltimore, Maryland, owned by Prime Retail, Inc.[1] These audits purportedly led AFS to find more than mere "discrepancies." AFS contends that it discovered that Prime Retail had made "improper charges and reserve assessments which could not be explained as mere errors or even aggressive billing practices. The errors were systematic and pervasive." Rather than simply "contact[ing], negotiat[ing], and settl[ing]" the discrepancies, AFS persuaded 16 other tenants located in Prime Retail malls to enter into similar contractual relationships with AFS [2] and thereby launched a larger attack against Prime Retail.

In May 1998, on behalf of the 17 tenants, AFS sent Prime Retail a demand letter in connection with a broad array of claims that AFS asserted it had discovered and

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[1] Prime Retail has now acquired Horizon and therefore we refer to the two collectively as "Prime Retail."

[2] One of the tenants did not sign a Letter of Agreement and Assignment but rather signed a similar document entitled "Consultant Agreement." Under the Consultant Agreement, AFS was to retain a fee of 50% of all "net recoveries," defined as the amount the tenant or AFS "actually received" from the landlord. The Consultant Agreement gave the tenant the right to disapprove any claims prepared by AFS and did not contain an assignment clause.

acquired through assignments. In response, Prime Retail filed an action in the Circuit Court for Queen Anne's County, Maryland, seeking a declaratory judgment that AFS was not the proper plaintiff on the claims and therefore lacked standing to assert them. Shortly thereafter, AFS commenced an action in the Central District of California for the claims it discovered in Michigan and Maryland, alleging RICO violations (i.e., violations of the Racketeering Influenced and Corrupt Organizations Act), violations of the California Business and Profession Code, fraud, breach of express and implied lease covenants, and related claims involving malls across the country. The district court in California transferred the action to the District of Maryland, after which AFS voluntarily dismissed the case without prejudice.

AFS then commenced a second action in the Circuit Court for Baltimore City, Maryland, which Prime Retail removed to federal court. In that action, AFS, suing in its own name on behalf of 17 tenants at almost 50 locations, alleged nine different causes of action similar to those alleged in the first action. It asserted two additional counts on its own behalf, alleging tortious interference with AFS's contractual relations and prospective advantage. Prime Retail filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6) and 17, as well as under 28 U.S.C. § 1367 (conferring supplemental jurisdiction). Among other things, Prime Retail contended that AFS lacked standing to bring the claims because the alleged assignments were invalid as against public policy.[3] With

[3] Prime Retail also asserted that AFS did not adequately allege causes of action under RICO; that punitive damage claims could not be

(Continued on following page)

respect to the two claims brought on AFS's own behalf – both under state law – Prime Retail urged the district court not to exercise supplemental jurisdiction.

The district court granted Prime Retail's motion to dismiss because "the assignments made by the tenants to AFS [were] void as a matter of public policy because they [were] champertous." The court also concluded that the assignments were void because they violated the public policy of both California and Maryland against "contingent fee witness agreements." The court observed that "[f]inancial arrangements that provide incentives for the falsification or exaggeration of testimony threaten the very integrity of the judicial process which depends upon the truthfulness of the witnesses." The court concluded that, without the assignments, AFS had no interest in the claims, and accordingly, it dismissed the first nine counts for AFS' lack of standing. With respect to the two state-law counts asserted by AFS on its own behalf, the district court declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c). From the district court's judgment in this case, AFS filed one of the appeals before us.

After the district court dismissed this second suit, AFS commenced a third action in state court, identical to the second action, to protect itself against the running of the statute of limitations on the two statelaw claims. This action was again removed to federal court, and the district court again dismissed the first nine counts, now relying on the doctrine of *res judicata*. With respect to the two state-law

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assigned to AFS by the tenants; and that the facts alleged did not amount to a claim under California's unfair competition statute.

causes of action, however, the court stayed disposition pending appeal. The court then certified final judgment under Federal Rule of Civil Procedure 54(b). AFS also filed an appeal from this judgment.

The two appeals now before us are concurrent, raising the same issue – whether the contractual arrangements between AFS and the tenants are void as against the public policy of Maryland.

II

AFS's standing to bring the claims at issue was created solely through the tenants' assignments to AFS of all legal claims that AFS discovered through its audits. Without the assignments, AFS had no interest in the tenants' claims. Moreover, AFS's interest in the claims was not based on securing any underlying transaction or preexisting commercial relationship between the tenants and AFS or satisfying any preexisting obligation. In short, AFS's interest in the litigation was solely to collect fees that its audits and litigation would generate.

AFS seeks to justify its contractual arrangements with the tenants under standard principles of assignment law, which recognize the legality of assigning both existing and potential choses in action, so long as the causes of action survive the death of the assignor. As AFS correctly asserts, those principles apply under both the law of Maryland and the law of California. *Hernandez v. Suburban Hosp. Ass'n, Inc.*, 319 Md. 226, 572 A.2d 144, 148 (Md. 1990) ("'[A] chose in action in tort is generally assignable, in the absence of a statutory prohibition, if it is a right which would survive the assignor and could be enforced by his personal representative'" (quoting *Summers v. Freishtat*,

274 Md. 404, 335 A.2d 89, 92 (Md.1975))); *Curtis v. Kellogg & Andelson*, 73 Cal.App.4th 492, 86 Cal.Rptr.2d 536, 545 (Cal. Ct. App. 1999) (stating California's rule that choses in action arising "out of an obligation, breach of contract, violation of right of property, or damage to personal or real property" are assignable).

Because all of the claims asserted in this case were commercial claims that would survive the death of the assignor, there is no question that the choses in action were generally assignable. But that general principle, heavily relied upon by AFS, does not override the principle that an assignment, like any other contract, is enforceable only to the extent that it is consistent with public policy. *See, e.g., Hernandez*, 572 A.2d at 148 (considering whether there were any public policy reasons to preclude a particular assignment); *see also McCabe v. Medex*, 141 Md. App. 558, 786 A.2d 57, 62 (Md. Ct. Spec. App.2001) ("[A] contract conflicting with public policy set forth in a statute is invalid to the extent of the conflict between the contract and that policy.").

While the assignments in this case contain a choice-of-law provision providing that California law governs, the parties' choice of law provision is enforceable only to the extent that the chosen law does not violate a fundamental public policy of the forum state, Maryland. *Am. Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 659 A.2d 1295, 1301 (Md. 1995) (stating that a choice-of-law clause will not be honored if "the strong fundamental public policy of the forum state precludes the application of the choice-of-law provision"); *see also Restatement (Second) of Conflict of Laws* § 187(2)(b) (1971). We must therefore determine whether the Assignments in this case violate Maryland's public policy.

At the outset, we observe that the assignments of the choses in action in this case were not made for the traditional purposes of securing an existing transaction, collecting on a pre-existing debt, giving effect to a form of subrogation, or satisfying a preexisting obligation. Rather, they were sought by AFS to further its business of uncovering claims and earning fees from collecting on them.

In entering into the arrangements at issue, AFS held itself out to the tenants as an expert in conducting audits of commercial leases, and it proposed to search the tenant's files for claims of which the tenant had no knowledge. There is no suggestion that the tenants knew or suspected wrongdoing before AFS proposed to perform the audits. As far as the tenants were concerned, there could have been major claims, minor claims, or no claims at all. The Letter of Agreement stated, quite simply, that AFS would seek to discover discrepancies. But despite this initial focus on discrepancies, AFS relied on the Assignment of choses in action to give effect to its contingent fee business, which was implemented in a manner that served AFS's interest more than the legitimate interest of resolving discrepancies in a manner suitable to the tenant.

The Assignments encompassed "any and all causes of action," present and future, and the consideration for them was not fixed but rather dependent on what AFS could discover. If discrepancies were discovered, the corresponding claims would immediately become the property of AFS under its sole control. And if, after discovery of the claims, the tenant were to determine that it would not be in the tenant's best interest to pursue litigation, there was no effective way to prevent AFS from prosecuting the claim in court. The cost to a tenant for refusing to cooperate or provide the information necessary for the litigation was

the obligation to pay AFS the fee that it otherwise would have earned had it successfully prosecuted the litigation. Thus, the tenant was left with the Hobson's Choice of allowing AFS to design and pursue a lawsuit on the tenant's behalf or of paying AFS its contingency fee as if AFS had succeeded, regardless of the merits of the proposed claim.[4]

In short, the Assignments, which were purchased with contingent consideration, gave AFS effective control over discovery and design of lawsuits, of which the assignor had no knowledge, without requiring, upon discovery, a renewed consent from the real party in interest before proceeding with litigation.

These relationships between AFS and the tenants were essentially lawsuit-mining arrangements under which AFS "mined for" and prosecuted lawsuits with no regard for the informed wishes of the real parties in interest. AFS thus became a promoter of litigation principally for the sake of the fees that it would earn for itself and not for the benefit that it might produce for the tenant, the real party in interest. Under these arrangements, even though the tenant might conclude, after reviewing the facts uncovered, that a lawsuit would imprudently damage the landlord-tenant relationship – or that pursuing aggressive allegations would do more harm than good – the tenant lost the right to control its destiny. Because we see these broad assignments as nothing more

[4] In contrast to this arrangement where AFS had total control over prosecuting its discoveries, the Consultant Agreement, signed by one tenant, gives the tenant the opportunity to review AFS' discoveries and to disapprove claims proposed by AFS.

than arrangements through which to intermeddle and stir up litigation for the purpose of making a profit, we conclude that they violate Maryland's strong public policy against stirring up litigation and are therefore void and unenforceable in Maryland.

The Court of Appeals of Maryland has recognized that the early common law had, in varying degrees, prohibited barratry, maintenance, and champerty, declaring contracts that provide for such conduct to be void.[5] *See Son v. Margolius,* 349 Md. 441, 709 A.2d 112, 119-20 (Md. 1998); *accord* 7 *Williston on Contracts* §§ 15.1, 15.4 (Richard A. Lord ed., 4th ed. 1997). But over time, the early definitions proved too broad and interfered with emerging commercial conditions, the recognition of assignments in general, and the rise of attorney representation under contingent-fee contracts. *See Son,* 709 A.2d at 119-21; *see generally* Max Radin, *Maintenance by Champerty,* 24 Cal. L. Rev. 48 (1935-36). Accordingly, the defining nature of barratry, maintenance and champerty changed over the years.

But despite the law's metamorphosis, Maryland continues to reserve a policy against some of the originally prohibited conduct. For example, the Maryland Court of Appeals explained, in *Son,* that conduct once characterized as maintenance is now prohibited in Maryland under the

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[5] Blackstone defined "*common barratry*" as the offense of "frequently exciting and stirring up suits and quarrels"; "*maintenance*" as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it"; and "*champerty*" as a "bargain with a plaintiff or defendant . . . to divide the land or other matter sued for between them . . . whereupon the champertor is to carry on the party's suit at his own expense." 4 William Blackstone, *Commentaries* *134-36.

label of barratry. *Son,* 709 A.2d at 120-21. The Maryland court observed that the broad definition of maintenance given in Blackstone's *Commentaries* did not survive in Maryland, 709 A.2d at 120, but that a more narrow form was retained under barratry, which remains against Maryland public policy. Thus, the common law has simply been redefined under a modern form of barratry to reflect the current public policy against "improperly, and for the purpose of stirring up litigation and strife, encourag[ing] others either to bring actions, or to make defenses which they have no right to make." *Id.* (internal quotation marks and citation omitted); *Schaferman v. O'Brien,* 28 Md. 565, 574 (1868) (citation omitted); *see also Wheeler v. Harrison,* 94 Md. 147, 50 A. 523, 526 (Md. 1901) (noting that the public policy is violated where "one officiously and without just cause intermeddles in and promotes the prosecution or defense of a suit in which he has no interest by assisting either party with money or otherwise"). In other words, the concepts of "officious meddling" and "personal gain" reflect the modern policy, described by *Williston,* against enforcing "schemes to promote litigation for the benefit of the promoter rather than for the benefit of the litigant or the public." 7 *Williston on Contracts* § 15:4.

Indeed, an aspect of the public policy developed under Maryland's common law was codified as a Maryland criminal statute, outlawing "barratry," as follows:

> Without an existing relationship or interest in an issue[,] a person may not, for personal gain, solicit another person to sue or to retain a lawyer to represent the other person in a lawsuit.

Md. Code Ann., Bus. Occ. & Prof. Art., § 10-604(a)(1). The Court of Appeals has characterized this statutory offense as the "stirring up, meddling in, or maintaining litigation

in which the person has no interest, for personal gain." *Son,* 709 A.2d at 121. And the key elements to the statutory offense are "officious meddling" and "personal gain." *Id.*

Thus, through surviving common law principles and statutory prohibition, the current fundamental public policy of Maryland prohibits schemes to stir up and promote litigation for the benefit of the promoter rather than for the benefit of the real party in interest. Any contract violating this policy is void in Maryland and will not be enforced by its courts.

Considering the contractual arrangements before us, it is apparent that they violate Maryland's strong public policy. These Assignments are not typical assignments of choses in action, which further existing or underlying commercial transactions. They are, rather, "schemes to promote litigation for the benefit of [AFS] rather than for the benefit of the litigant or the public." As we explained above, the tenants, who were the real parties in interest, assigned rights in litigation of which they had no knowledge. Moreover, these rights were assigned, not in exchange for an existing value, but for future fees to be determined by decisions and value judgments controlled by AFS, who had no interest in the underlying claims. Because the rights were assigned before their nature, costs and benefits could be assessed, the real parties in interest – the tenants – had no opportunity to evaluate whether their prosecution was in the tenants' interest. As such, AFS was given the power to mine lawsuits, promote them, and profit off of them without regard to the interests and desires of the injured party.

The essence of the contractual relationship between AFS and the tenants leaves AFS as a solicitor, for personal gain, of unknown litigation, in the business of stirring up litigation for the sake of its fees. If its real purpose was to provide consulting services within its expertise, as it insists, it can continue that business without the assignments. By concluding that the assignments in this case are against fundamental public policy, we in no way undermine or devalue any claims that AFS has discovered and that the tenants may have. If those claims are viable, the tenants retain the right to prosecute them with the assistance of AFS. Our holding focuses only on the promotional efforts of AFS in stirring up litigation primarily at its own initiative and for its own benefit.

We thus agree with the district court that, whether under the label of maintenance, champerty or barratry, the Assignments in this case violate Maryland's strong public policy against the stirring up litigation or promoting litigation for the benefit of the promoter rather than for the benefit of the litigant or the public.

III

In addition to our conclusion that the Assignments violate Maryland's public policy against barratry, we also conclude that the arrangements are against public policy insofar as they provide for supplying *expert* testimony for a contingent fee. To the extent that AFS employees, as experts on the relationship between landlords and tenants in a commercial context, planned to testify regarding the allegations in this litigation, AFS was offering expert testimony for a contingent fee. Such an arrangement

would also violate public policy, as articulated more fully by the district court.

Because of our rulings, we need not reach the other issues raised by AFS on appeal. The judgment of the district court is AFFIRMED.

DISSENT BY:
MICHAEL

DISSENT:

MICHAEL, Circuit Judge, dissenting:

A number of tenants at factory outlet malls engage Accrued Financial Services, Inc. (AFS) to audit common area maintenance charges that landlords add to the tenants' rent bills. AFS takes an assignment of any claims discovered in the audits and retains a percentage of any overcharges collected as a fee for its services. This sounds like a sensible arrangement, and it is one that is legal under California law, the law chosen by AFS and the tenants to govern their contracts. The majority outlaws the assignments, however, saying that the assignments stir up lawsuits and allow AFS to supply expert testimony for a contingent fee, all in violation of the public policy of Maryland, the forum state. I respectfully dissent for two reasons. First, the Restatement (Second) of Conflict of Laws § 187, which Maryland has adopted, requires that the contracting parties' choice of California law be honored in this case. Even if Maryland law did apply, it would not prevent the tenants from protecting themselves through the arrangement chosen for the discovery and collection of overcharges, an arrangement that avoids litigation more

than nine times out of ten. Second, because AFS owns the claims that are the subject of this lawsuit, the company is not supplying expert testimony for a contingent fee.

I.

AFS is a California-based company that provides lease audit services for tenants operating stores in factory outlet malls throughout the United States. Mall landlords, such as Prime Retail, Inc. (Prime),[1] commonly require their tenants to sign leases that obligate the tenants to pay assessed charges for common area maintenance expenses. These charges cover certain mall operating expenses, ranging from real estate taxes to marketing and promotional costs. In some cases, the leases require the tenants to pay into a reserve fund that is set aside to cover these expenses. Invoices to tenants for common area maintenance charges are usually in summary form. The leases, however, permit the tenants to conduct audits of these charges. That is where AFS comes in: it conducts the audits for tenants.

According to AFS, an audit usually reveals some errors in charges billed to the tenant, and occasionally an audit uncovers overly aggressive or dishonest calculation of charges. In most cases, each tenant's claim for an audit period (usually one year) is relatively small in dollar amount. Thus, most tenants do not find it economically feasible to conduct their own audits. But AFS, by securing audit engagements from several tenants in the same mall

[1] "Prime" includes Horizon Group, Inc., a company acquired by Prime.

and then conducting a single audit for those tenants, makes the contractual right to conduct audits meaningful for the individual tenant. AFS performs the audits in return for a percentage of any overcharges it collects. The contingent nature of AFS's compensation also helps to make the audits affordable. Overcharges are collected without litigation more than ninety percent of the time.

AFS's authority to conduct the lease audits and pursue collection of overcharges is set forth in two agreements entered into between AFS and the tenant, a "Letter of Agreement Regarding Leased Location" and an "Assignment of Cause of Action." In the "Letter of Agreement" the tenant designates AFS as its representative to conduct a lease audit, and AFS agrees to "use reasonable efforts to ascertain . . . whether [the tenant] has been overcharged for any Tenant Contributions." The tenant assigns any overcharges to AFS. AFS is authorized "to contact, negotiate, and settle" with the landlord and "to file all lawsuits under AFS's name as plaintiff." For its work, AFS retains 40 to 50 percent of any overcharges recovered, and the tenant gets the balance. The "Assignment of Cause of Action" spells out the details in routine fashion. The tenant assigns to AFS "any and all causes of action it may have against" the landlord. "Full authority is conferred on Assignee [AFS] to perform all lawful acts deemed necessary by Assignee, or its agents, to pursue and collect on the assigned cause of action. Assignee may adjust, compromise, or settle the assigned cause of action at its reasonable discretion." AFS must "advance all litigation costs incurred and be personally liable for those costs." In addition, "[u]nder no circumstances shall Assignor [the tenant] be liable for any litigation costs in excess of any recovery on the claim." Finally, the assignment provides

that it will "be governed by and construed in accordance with the laws of California."

In 1997 AFS began audits at Prime, which owns and manages factory outlet malls where a number of AFS's clients are tenants. The audits were commenced in Michigan and Maryland. According to AFS, the audits uncovered improper charges and reserve assessments that cannot be explained as inadvertent errors or even as aggressive billing practices. AFS claims that the audits revealed a systematic effort by Prime to conceal from the tenants the improper nature of many of the charges assessed. AFS further claims that it discovered a pattern of fraud on the part of Prime that has likely resulted in millions of dollars in overcharges to tenants. Finally, AFS claims that when it began to uncover the scheme in the audit it was conducting in Maryland, Prime stopped the audit before it was finished. The majority opinion describes several lawsuits (the first one was filed by Prime) that ensued between Prime and AFS, after Prime refused to negotiate. In this case, AFS, as assignee of seventeen tenants with stores in dozens of malls, sues Prime for breach of express and implied lease covenants, fraud, and violations of RICO and the California unfair competition statute.

II.

A.

The majority's main holding is that the tenants' assignments to AFS are void because they violate a strong public policy in Maryland against "stirring up litigation," whether it be called maintenance, champerty, or barratry. *Ante* at 15. The majority thus rejects California law, the

law chosen by AFS and the tenants to govern the application and validity of the assignments. California does not recognize the doctrines of maintenance and champerty, *see Abbott Ford, Inc. v. Superior Court,* 43 Cal. 3d 858 741 P.2d 124, 141 n.26, 239 Cal. Rptr. 626 (Cal. 1987), and no person can be convicted of barratry unless he has corruptly or maliciously "excited" at least three vexatious lawsuits, *see* Cal. Penal Code § 159 (2002). The assignments are therefore valid under California law. The majority nonetheless contends that the choice of law provision is not enforceable because the chosen (California) law violates a fundamental policy of the forum state, Maryland. The majority is wrong, I respectfully suggest, because three conditions must be present before Maryland will refuse to apply, for public policy reasons, the law selected by the parties to a contract. None of these conditions are present in this case.

Maryland recognizes "that the parties to a contract may agree as to the law which will govern their transaction, even as to issues going to the validity of the contract." *Kronovet v. Lipchin,* 288 Md. 30, 415 A.2d 1096, 1104 (Md. 1980). Maryland relies on section 187 of the Restatement (Second) of Conflict of Laws to determine the validity of a contractual choice of law provision. *Nat'l Glass, Inc. v. J.C. Penney Props., Inc.,* 336 Md. 606, 650 A.2d 246, 248 (Md. 1994); *Ciena Corp. v. Jarrard,* 203 F.3d 312, 323 (4th Cir. 2000). Section 187(2) of the Restatement provides in pertinent part:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, . . . unless . . . .

> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187(2) (Supp. 1989). Three conditions must therefore be met before Maryland would reject California law on the ground that Maryland public policy is implicated. First, Maryland law must apply in the absence of an effective choice of law provision. Second, the California law must be contrary to a fundamental (or strong) public policy of Maryland. Third, Maryland must have a materially greater interest than California in the outcome of the particular issue, here, whether the assignments are legal. The majority never addresses the first and third conditions even though all three must be met under the Restatement rule adopted by Maryland. *See Nat'l Glass,* 650 A.2d at 248-251.

As to the first condition, the question is whether Maryland law would apply if the parties had not made a choice in their contract. Maryland relies on *lex loci contractus* if there is no choice of law provision. *Am. Motorists Ins. Co. v. ARTRA Group, Inc.,* 338 Md. 560, 659 A.2d 1295, 1301 (Md. 1995). "Under this principle, the law of the jurisdiction where the contract was made controls its validity and construction." *Kramer v. Bally's Park Place, Inc.,* 311 Md. 387, 535 A.2d 466, 467 (Md. 1988). This case was decided on Prime's motion to dismiss, and there is no suggestion in the pleadings or in the motion papers that the assignment contracts between AFS and its clients (the outlet mall tenants) were made in Maryland. Indeed, it

appears highly unlikely that the contracts would have been made in Maryland because AFS is located in Long Beach, California, and none of the tenants are headquartered in Maryland. In sum, at this stage the record does not allow a determination that Maryland law would apply to the assignments in the absence of a choice of law provision. Thus, the first condition of § 187(2)(b) of the Restatement has not been met.

For the second condition, the question is whether California law – the law that would allow the assignments – violates a strong public policy of Maryland. The existence of a routine difference between California and Maryland law would not be sufficient to satisfy this condition: "merely because Maryland law is dissimilar to the law of another jurisdiction does not render the latter contrary to Maryland public policy." *Am. Motorists,* 659 A.2d at 1301 n.3. Rather, for the second condition to be met, there must be a *strong* public policy against the enforcement of the foreign law in Maryland. *Bethlehem Steel Corp. v. G.C. Zarnas & Co.,* 304 Md. 183, 498 A.2d 605, 608 (Md. 1985). So far, the only time Maryland courts have found a contractually chosen law to violate strong Maryland policy is when the foreign law conflicts with a Maryland statute that contains a clear statement of policy. *See Bethlehem Steel,* 498 A.2d at 608 (law of chosen state permitted a contract that a Maryland statute expressly described as one that "is against public policy" and "is void and unenforceable."); *Nat'l Glass,* 650 A.2d at 250 (chosen law clashed with Maryland statute stating that "any provision . . . made in violation of this section is *void as against the public policy of this State.*"). The Maryland courts have not yet said whether a chosen law is contrary to a public policy that can only be inferred from Maryland's common law. In any

event, strong Maryland public policy cannot "be represented by a [common law] rule [that is] tending to become obsolete." Restatement § 187(2) cmt. g (Supp. 1989). Maryland's common law on maintenance, champerty, and barratry appears to be tending toward obsolescence because, as far as I can tell, Maryland has not used these common law doctrines to invalidate any contract in the last one hundred years.[2] Indeed, as far back as 1868 the Court of Appeals of Maryland noted that "the common law notion of maintenance, as applicable to the assignments of rights of action, had become practically obsolete." *Schaferman v. O'Brien,* 28 Md. 565 (1868) (quoting Story's Equity Jur. § 1057). Accordingly, no strong public policy against the California law allowing the assignments in this case can be gleaned from whatever, if anything, might remain of the common law doctrines of maintenance, champerty, and barratry in Maryland.

If there is any strong public policy to be found here, it must be found in Maryland's barratry statute. For that statute to evidence strong Maryland policy, the policy must be "expressly stated" or "explicitly determined" by the General Assembly. *Nat'l Glass,* 650 A.2d 246 at 249-50 (internal quotations and citations omitted). Maryland's barratry statute, as applied to non-lawyers, provides:

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[2] The majority does not cite a single case in which a contract was found to violate any Maryland common law against maintenance, champerty, or barratry. The assignment contracts in both *Schaferman v. O'Brien,* 28 Md. 565 (1868), and *Wheeler v. Harrison,* 94 Md. 147, 50 A. 523 (Md.1901), were upheld. The majority's only case from the last hundred years, *Son v. Margolius, Mallios, Davis, Rider & Tomar,* 349 Md. 441, 709 A.2d 112 (Md. 1998), focused on Maryland's barratry statute. In any case, the agreement in *Son* was also upheld.

"Without an existing relationship or interest in an issue . . . a person may not, for personal gain, solicit another person to sue or to retain a lawyer to represent the other person in a lawsuit." Md. Code Ann., Bus. Occ. & Prof. § 10-604(a)(1) (2000). The General Assembly has not made any express statement of strong public policy in this language. It is simply a run-of-the-mill misdemeanor provision.

There is, then, no indication that application of the law of the chosen state, California, would be contrary to any strong public policy of Maryland. But even if it could be shown that the assignments violated strong Maryland policy, that would not end the matter because it still "must [be] determined whether Maryland has a materially greater interest in the determination of the issue." *General Ins. Co. of Am. v. Interstate Serv., Inc.,* 118 Md. App. 126, 701 A.2d 1213, 1218-19 (Md Ct. Spec. App. 1997). In determining whether Maryland has a materially greater interest in an issue, the courts of Maryland (1) evaluate the contacts the parties and their contract have with Maryland and the chosen state and (2) take into account strong Maryland public policy that bears on the issue. *See Nat'l Glass,* 650 A.2d at 250-51. The contacts listed in Restatement § 188(2) are the ones evaluated in deciding which state has a materially greater interest. *See, e.g., Ticknor v. Choice Hotels Int'l, Inc.,* 265 F.3d 931, 938 (9th Cir. 2001). These contacts include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and,

> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

Restatement (Second) of Conflict of Laws § 188(2) (1971).

Factor (e), which focuses on the location of the contracting parties and their places of incorporation, favors California. AFS is a California corporation, with its sole place of business in Long Beach, California. Four of AFS's clients are headquartered in California, and none are headquartered in Maryland. Factors (a) and (b), which focus on where the contract was negotiated and made, almost certainly favor California: given the contracting parties' physical locations, there is no reason to believe that the contracts were negotiated or entered into in Maryland. Factor (d), relating to the location of the subject matter of the contracts (here, the outlet stores and leases), also appears to favor California. At least a dozen of AFS's seventeen clients have outlet stores in California, and only five have stores in Maryland. Every client with stores in both states has more stores in California than in Maryland. For example, client Claire's Boutiques, Inc. has four stores in California and two in Maryland. Information relevant to factor (c), the place of performance of the contracts, is somewhat sparse. We do know that AFS started audits in Michigan and Maryland and that Prime forced AFS to stop the Maryland audit before it was completed. The Maryland audit, which Prime itself ended, is the only contact that could count in Maryland's favor. In any event, when the information about all of the factors is considered together, California has significantly more contacts with the matter than Maryland.

As mentioned, in deciding which state has a materially greater interest (the third condition of Restatement

§ 187(2)(b)), Maryland also considers whether it has a strong public policy against the chosen law. *Nat'l Glass,* 650 A.2d at 251. Here, of course, Maryland has no strong public policy against champerty, maintenance, or barratry. Because the contacts strongly favor California, and because Maryland has no strong public policy against the assignments, it is evident that California has a materially greater interest in the outcome of this case than Maryland. In conclusion, because the contracting parties' choice of California law must be respected under the terms of Restatement § 187(2)(b), California law governs any issue concerning the validity of the assignments. The majority, which fails to conduct a full analysis, errs in holding that Maryland would not honor the choice-of-law provision agreed to by AFS and its clients, the outlet mall tenants.

B.

There is another fundamental problem with dismissing AFS's case. The limited record, which was made in connection with Prime's motion to dismiss, does not establish that AFS's conduct meets the legal standards required for whatever is left of the doctrines of champerty, maintenance, and barratry in Maryland. Again, Maryland does have a barratry statute which provides: "Without an existing relationship or interest in an issue . . . a person may not, for personal gain, solicit another person to sue or to retain a lawyer to represent the other person in a lawsuit." Md. Code Ann., Bus. Occ. & Prof., § 10- 604(a)(1) (2000). According to the Maryland Court of Special Appeals, "[t]he essence of [the crime of] barratry is the solicitation of another to make a litigious claim by one without an existing relationship or interest for his own gain." *Schackow v. Medical-Legal Consulting Serv., Inc.,*

46 Md. App. 179, 416 A.2d 1303, 1312 (Md. Ct. Spec. App. 1980). AFS was not pushing or soliciting litigation here. AFS's first, and most important, task under the agreements and assignments was to conduct audits, audits the tenants had the right to pursue under their leases. If AFS found an overcharge, it had the authority to contact the landlord and obtain a refund or negotiate a settlement. Litigation is available as a last resort, and AFS has had to pursue litigation in relatively few cases. AFS's president, Mark S. Malan, confirms this in his *unrefuted* affidavit:

> In my 15 years of performing reviews of commercial leases and 5 years experience in performing lease audits, it has only rarely been necessary to commence legal action against a landlord or management company to collect overcharges. In fact, I estimate that litigation has been required in less than 10% of the engagements for which we have been retained.

AFS thus did not solicit its clients to make litigious claims. In this case, in particular, litigation became necessary only because Prime shut down an audit and refused to negotiate. AFS has thus not committed barratry under the Maryland statute, and it has not been "stirring up litigation" or "mining for lawsuits," as the majority charges.

Even if the common law doctrines of champerty, maintenance, and barratry are not obsolete in Maryland, what is left of them does not apply to this case. In the first place, these doctrines do not outlaw every effort by a person to encourage or assist another in pursuing litigation. The Maryland Court of Appeals recognized this in *Son* when it quoted Lord Abinger, Chief Baron of the Court of Exchequer, who said: "if a man were to see a poor person in the

street oppressed and abused, and without the means of obtaining redress, and furnished him with money and employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that man could be said to be stirring up litigation and strife." *Son,* 709 A.2d at 120 n.5 (quoting *Findon v. Parker,* 11 M. & W. 679 (1843)). Lord Abinger's comment in 1843 is simply the starting point. Today, we allow many practices that encourage litigation. For example, contingent fees are legal, Maryland Rules of Professional Conduct 1.5(c); lawyers are allowed to advertise, *Bates v. State Bar of Arizona,* 433 U.S. 350, 53 L.Ed.2d 810, 97 S. Ct. 2691, 51 Ohio Misc. 1, 5 Ohio Op. 3d 60 (1977); choses-in-action may be assigned, *Hernandez v. Suburban Hosp. Assoc., Inc.,* 319 Md. 226, 572 A.2d 144 (Md. 1990); and class actions are permitted, Fed. R. Civ. P. 23.

The common law, to the extent it is still viable, would thus not outlaw all efforts to facilitate litigation. Rather, it would be aimed at the stirring up of a certain kind of litigation, specifically, litigation that is groundless, vexatious, or multitudinous. *See Osprey, Inc. v. Cabana Ltd. P'ship,* 340 S.C. 367, 532 S.E.2d 269, 273 (S.C. 2000) ("The laws against champerty, maintenance and barratry are aimed at the prevention of multitudinous and useless lawsuits."). When the allegations in the complaint in this case are taken as true, as they must be on a motion to dismiss, it cannot be said that AFS is pursuing, or encouraging the pursuit of, groundless, vexatious, or multitudinous litigation. Rather, AFS makes a serious claim, based on a partial audit, that Prime over-charged its tenants, through aggressive billing or fraud, in amounts that could total millions of dollars. Moreover, because AFS must bear the expenses of any unsuccessful litigation, it is unlikely

that it would waste its resources on a pointless lawsuit. In any case, if AFS has filed a frivolous or vexatious lawsuit – and there is no indication thus far that it has – there is a way to deal with the problem without outlawing the assignments. Rule 11, for example, allows stiff sanctions to be imposed upon lawyers and parties who present pleadings "for any improper purpose, such as to harass" or who present pleadings that lack "evidentiary support." Fed. R. Civ. P. 11(b), (c).

The doctrines of champerty, maintenance, and barratry were also meant to protect against "financial overreaching by a party of superior bargaining position." *Saladini v. Righellis,* 426 Mass. 231, 687 N.E.2d 1224, 1226 (Mass. 1997). The majority implies that AFS engaged in overreaching here, saying that the assignments leave the tenants with the Hobson's choice of either allowing AFS to pursue litigation or buying back their claims for an amount equal to AFS's fees. There is every reason to believe that the tenants, who are large outlet store companies such as Anne Klein Factory Stores, Inc., Corning Revere Factory Stores, Publisher's Warehouse, and Lechter's, were able to bargain with AFS on equal footing. Indeed, the tenants are substantial companies, and AFS has less than a half dozen employees. It is reasonable to conclude that had the tenants not found the assignments to be advantageous, they would not have executed them. Also, there is no evidence that any tenant was reluctant to allow AFS to sue Prime because all of the tenants ratified their assignments after the lawsuit began. Thus, the majority's argument that the assignments serve AFS's interests more than its clients' (the tenants') interests is without any foundation. Although it is true the tenants could have retained their claims and sued in their own

names, history has proven that option to be uneconomical in most instances. That is why the tenants assigned their claims to AFS in the first place. The majority's decision thus hurts the tenants, not just AFS. The decision benefits the mall owners and managers, who could be getting away with overcharging and fraud.

C.

The majority wants to stamp out "lawsuit-mining arrangements" and vexatious lawsuits. This is a worthy goal, but the majority takes an unprecedented step to achieve it. The majority restricts the tenants' right to contract, specifically, the right to enter into assignment contracts that provide a cost-efficient means of protecting against sharp billing practices and fraud by landlords at outlet malls. The State of Maryland does not have any fundamental policy or law that dictates this result. *Cf.* U.S. Const. art. I § 10 ("No State shall . . . pass any . . . law impairing the Obligation of Contracts"). Today's decision also means that AFS is barred from suing on the assigned claims that it legitimately owns. That is overkill.

III.

The majority also holds that the assignments are void and unenforceable as a matter of public policy because, the majority claims, AFS is being paid a contingent fee for supplying expert testimony. I respectfully disagree. I recognize, of course, that "[a]n agreement with a witness to pay him a fee contingent on the success of the litigation is against public policy and void." *Van Norden v. Metson,* 75 Cal. App. 2d 595, 171 P.2d 485, 488 (Cal. Dist. Ct. App. 1946). However, AFS was not hired to provide expert

testimony. Instead, AFS was hired as an auditor, and any claims uncovered in the audit are assigned to AFS. The assignments make AFS the real party in interest, and a corporation that is a real party in interest may offer in its own case the testimony of its principals and employees.

Nor are AFS and the tenants attempting to mask a contingent fee witness arrangement behind an assignment. The assignments are, in most respects, routine. AFS has full authority to do what is necessary "to pursue and collect on the assigned causes of action," including settling in "its reasonable discretion." AFS must advance all litigation costs and is responsible for those costs if the litigation is unsuccessful. AFS does, of course, "receive as a commission for [its] services [forty to fifty percent] of the Net Recovery." Nonetheless, because these contracts transfer the claims to AFS and provide that AFS will sue in its own name, control the litigation, and pay all litigation costs, they are true assignments. AFS is therefore the real party in interest, and it may offer the testimony of its own people without violating any public policy against supplying expert testimony for a contingent fee.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ACCRUED FINANCIAL SERVICES, INC.	*	
	*	
	*	Civil No. JFM-99-2573
v.	*	
PRIME RETAIL, INC., ET AL.	*	

* * *

ORDER

(Filed June 19, 2000)

For the reasons stated in the accompanying memorandum, it is, this 19th day of June 2000

ORDERED

1. Defendants' motion to dismiss is granted;

2. Counts I through IX are dismissed for failure to state a claim upon which relief can be granted; and

3. This court declines to exercise supplemental jurisdiction over Counts X and XI.

/s/ _____
Frederick Motz
United States District Judge

2000 WL 976800

United States District Court, D. Maryland.

ACCRUED FINANCIAL SERVICES, INC.,

v.

PRIME RETAIL, INC., et al.

No. CIV.JFM-99-2573.

June 19, 2000.

MEMORANDUM

MOTZ

Accrued Financial Services, Inc. ("AFS") has brought this action against two affiliated companies, Prime Retail, Inc. ("Prime") and Horizon Group, Inc. ("Horizon"). AFS, as the assignee of commercial tenants in factory outlet malls managed by defendants, claims that defendants fraudulently over-billed the tenants for common area maintenance charges. Defendants have filed a motion to dismiss. The motion will be granted.

I.

Tenants in factory outlet malls typically have the right under their leases to conduct audits of common area maintenance charges assessed by the manager of a mall. AFS provides various services in the commercial real estate industry, including the performance of such audits for tenants. Ordinarily, AFS is compensated by a percentage of the amount it saves for the tenant by way of refund or partial abatement of future rent. Sometimes, as in this case, AFS takes an assignment of the tenants' claims against the landlord and/or manager of a mall.

AFS alleges that in 1997 it conducted audits at Horizon and Prime .[1] According to AFS, its audits revealed systemic and pervasive errors in the assessments made by Horizon and Prime, and repeated efforts by them to conceal from the tenants the true nature of the charges being made. AFS obtained assignments from many (but not all) of the tenants at the malls and, based upon what it learned during the course of the audits, instituted this suit. It asserts RICO claims as well as common law claims for fraud, tortious interference with contract, and a violation of the California Unfair Competition statute.

II.

Defendants make numerous arguments in support of their motion to dismiss, including the following: (1) AFS lacks standing because it is not the real party in interest as to most of the claims it asserts; (2) AFS fails to allege any RICO predicate acts with particularity, fails to allege a RICO "enterprise" distinct from the RICO "persons," and does not make sufficient allegations demonstrating how certain defendants participated in the operation or management of the enterprise; (3) the common law claims upon which AFS sues as assignee are unassignable; and (4) the tenants (from whom AFS' right to sue is derived) are not competitors or consumers entitled to protection under the California Unfair Competition statute. I need not decide the issues raised by these arguments since I find persuasive a broader contention made by defendants:

---

[1] At the time, the two companies were independent of one another. However, since the audits, Prime has acquired Horizon by merger and now operates the former Horizon malls involved in this case.

that the assignments made by the tenants to AFS are void as a matter of public policy because they are champertous.[2]

III.

Under the terms of the agreements between AFS and the tenants, AFS is to receive either forty or fifty percent of any judgment received from litigation instituted by AFS against the defendants. The agreements contemplate that AFS employees will perform the audit services and, according to an averment that AFS has made in opposing a motion to dismiss or to transfer in a prior related action, AFS employees intend to appear as audit witnesses at trial.

The agreements between AFS and the tenants call for the application of California law. Under California law

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[2] The RICO issues are vexing, and I will decline to comment upon them. However, it may be useful for me to state briefly my conclusions as to the other arguments defendants make. First, I am satisfied that in light of the ratifications AFS has obtained, the assignments are sufficient to meet the Fed.R.Civ.P. 17(a) concerns raised by defendants. Second, I am persuaded that the tenants' common law fraud and punitive damage claims are not assignable under California law. I do not read *Jackson v. Rogers & Wells,* 258 Cal.Rptr. 454, 459-60 (Ct.App.1989) as being limited to legal malpractice cases. Rather, I believe that California law draws a distinction on the assignability question between a specific item of property that has been fraudulently obtained and a "mere naked right of action for fraud and deceit." *Jackson v. Deauville Holding Co.,* 27 P.2d 643, 645 (Cal.1933). Third, I do not believe that the tenants are competitors or consumers of the defendants and therefore are not entitled to the protection afforded by California's Unfair Competition statute. Cal.Bus. & Prof.Code § 17200 *et seq.; see also Tippett v. Terich,* 44 Cal.Rptr.2d 862, 874 (Ct.App.1995).

contingent fee witness agreements are clearly void as violative of public policy. *See, e.g., Von Kesler v. Baker,* 21 P.2d 1017 (Cal.Dist.Ct.App.1933); *Ojeda v. Sharp Cabriollo Hosp.,* 10 Cal. Reptr.2d 230 (Ct.App.1992). Therefore, the assignments fail unless the parties' contractual choice of law is to be disregarded.

There is no reason that should be done. Section 187 of the *Restatement (Second) of Conflict of Laws* (1971) provides an appropriate source for guidance on the choice of law issue. Maryland and California have both adopted § 187. *See National Glass, Inc. v. J.C. Penney Properties, Inc.,* 650 A.2d 246, 248 (Md.1994); *Nedlloyd Lines B.V. v. Superior Court of San Mateo County,* 834 P .2d 1148, 1151 (Cal.1992). Federal courts have done the same in deciding choice-of-law issues as to federal claims. *See Harris v. Polskie Linie Lotnicze,* 820 F.2d 1000, 1003 (9th Cir.1987); *In re Catfish Antitrust Litig.,* 908 F.Supp. 400, 411-12 (N.D.Miss.1995).

Section 187 provides as follows:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and

there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Restatement (Second) of Conflict of Law (1971).

California clearly has a substantial relationship to the parties to the assignment. Accordingly, under § 187(2)(b), application of California law is appropriate unless application of that law would be contrary to a fundamental policy of a jurisdiction which has a materially greater interest than California in determining the validity of the assignment and which, absent the choice of California law made by the parties, would be the jurisdiction whose law was applied. I will assume that if the parties had not chosen the application of California law, Maryland would have provided the applicable law as to the state law claims and federal common law would have been applicable as to the RICO claims. Therefore, the question becomes whether it would be contrary to a fundamental policy of either Maryland or the United States to refuse to enforce a contract providing for payment of a contingent fee to a witness.

AFS has pointed to nothing to suggest that is so. To the contrary, the Maryland Rules of Professional Conduct

applicable to members of the bar recognize that "[t]he common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee." Md. Rules 16-812, Rules of Professional Conduct 3.4 cmt. (2000). In my judgment this rule is fundamentally sound. Financial arrangements that provide incentives for the falsification or exaggeration of testimony threaten the very integrity of the judicial process which depends upon the truthfulness of the witnesses.[3]

For these reasons I find the assignments made by the tenants to AFS to have been void. Therefore, AFS has no standing to bring any of the claims asserted in the complaint except those stated in Counts X and XI. There is no diversity of citizenship between the parties, and I decline to exercise supplemental jurisdiction over those claims.

ORDER

For the reasons stated in the accompanying memorandum, it is, this 19th day of June 2000

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[3] I have structured my analysis in the text as a choice-of-law issue. I have done so because California law so clearly prohibits witness contingency fee agreements. Perhaps I should add that if Maryland or federal common law were found to apply to the issue, I would hold that witness contingency fee agreements affirmatively violate the fundamental policy of Maryland and the United States. I recognize, as AFS argues, that firms providing auditing services to tenants in factory malls may provide an effective (and wholesome) deterrent to fraudulent billing practices by mall managers. However, they can do so without entering into contingency fee agreements. Moreover, procedural devices, such as class actions and rules permitting joinder of claims, can assist in providing protection to defrauded tenants.

ORDERED

1. Defendants' motion to dismiss is granted;

2. Counts I through IX are dismissed for failure to state a claim upon which relief can be granted; and

3. This court declines to exercise supplemental jurisdiction over Counts X and XI.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ACCRUED FINANCIAL SERVICES, INC.	*	
	*	
v.	*	Civil No. JFM-00-2474
	*	
PRIME RETAIL, INC., ET AL.	*	

* * *

ORDER

(Filed Oct. 11, 2000)

For the reasons stated in the accompanying memorandum, it is, this 11th day of October 2000

ORDERED

1. Defendants' motion to dismiss is granted in part and denied in part;

2. Counts one through nine are dismissed;

3. Plaintiff's motion to stay is granted in part and denied in part;

5. This action is administratively closed, subject to being reopened within thirty days after the issuance of the mandate by the Fourth Circuit in the appeal in *Accrued Financial Services v. Prime Retail, Inc.*, Civil Action No. JFM-99-2573.

/s/ _____
J. Frederick Motz
United States District Judge

2000 WL 1528697

United States District Court, D. Maryland.

ACCRUED FINANCIAL SERVICES, INC.,

v.

PRIME RETAIL, INC., et al.

No. CIV.JFM-00-2474.

Oct. 13, 2000.

MEMORANDUM

MOTZ.

On June 19, 2000 I dismissed an action filed by Accrued Financial Services, Inc. ("AFS") against Prime Retail, Inc., et al and other defendants. AFS has filed an appeal, and the appeal is presently pending. Thereafter, AFS filed in the Circuit Court for Baltimore City a complaint identical to the one I previously dismissed. It simultaneously filed a motion to stay, pending resolution of the appeal in the earlier case. Defendants removed the present action to this court. They have opposed AFS' motion to stay and filed a motion to dismiss.

The motion to dismiss will be granted as to the nine claims I previously dismissed. These claims clearly are barred by res judicata. AFS' argument that a second filing should be permitted to protect the rights of the tenants whom AFS purports to represent is unavailing. If, as I have held, AFS lacks standing, its filing of the second action will not protect the tenants' rights at all. If they desire to protect their rights, they must institute suit themselves.

The two claims asserted by AFS in its own right over which I previously declined to exercise supplemental jurisdiction present a different question. AFS contends

that it is compelled to file the second action now because it is unclear whether a plaintiff seeking to invoke the benefit of Maryland Rule of Procedure 2-101 must file an action within thirty days of a trial court's dismissal of an action on jurisdictional grounds (rather than within thirty days of appellate resolution of the jurisdictional issue) in order to avoid a limitations bar. Apparently, no court has decided the issue. Accordingly, AFS has acted prudently in promptly refiling in the Circuit Court for Baltimore City the two claims over which I declined to exercise supplemental jurisdiction. I will stay, rather than dismiss those claims, with the expectation that if my earlier ruling is affirmed on appeal, I will remand the remaining two claims to the Circuit Court for Baltimore City. In the interim, I will administratively close this case.

A separate order effecting the rulings made in this memorandum is being entered herewith.

ORDER

For the reasons stated in the accompanying memorandum, it is, this *11th* day of October 2000

ORDERED

1. Defendants' motion to dismiss is granted in part and denied in part;

2. Counts one through nine are dismissed;

3. Plaintiff's motion to stay is granted in part and denied in part;

4. Counts ten and eleven are stayed; and

5. This action is administratively closed, subject to being reopened within thirty days after the issuance of the mandate by the Fourth Circuit in the appeal in *Accrued Financial Services v. Prime Retail, Inc.*, Civil Action No. JFM 99-2573.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Accrued Financial Services, Inc.	*	
Plaintiff,	*	
v.	*	Civil Action No.
Prime Retail, Inc., et al.	*	JFM-00-2474
Defendants.	*	

AMENDED ORDER OF DISMISSAL AND CERTIFICATION PURSUANT TO FED. R. CIV. P. 54(b)

(Filed February 6, 2001)

THIS MATTER comes before the Court upon plaintiff's motion for certification under Fed. R. Civ. P. 54(b) of the Court's October 11, 2000 Order dismissing nine of the eleven claims asserted in the Complaint in this case and to thus permit an immediate appeal of the dismissal of those claims. Upon consideration of same and being fully advised in the premises and for the reasons stated in the Memorandum the Court issued on October 11, 2000, it is hereby ORDERED that:

1. Defendants' motion to dismiss is granted in part and denied in part;

2. Counts one through nine are dismissed, and the Court expressly determines that there is no just reason for delaying appeal from the dismissal of those claims, and the Court hereby expressly directs entry of a final judgment of dismissal of those claims pursuant to Fed. R. Civ. P. 54(b);

3. Plaintiff's motion to stay is granted in part and denied in part;

4. Further proceedings on counts ten and eleven are hereby stayed until further order of the Court; and

5. This action is administratively closed, subject to being reopened within 30 days after the issuance of the mandate by the U.S. Court of Appeals for the Fourth Circuit in the appeal from dismissal of *Accrued Financial Services, Inc. v. Prime Retail Inc.*, Civil Action No. JFM-99-2573.

Done this 6th day of February, 2000 BY THE COURT:

By: _____
J. Frederick Motz
United States
District Judge

JUDGMENT

FILED: July 29, 2002

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 00-1971
CA-99-2573-JFM

ACCRUED FINANCIAL SERVICES, INCORPORATED, for itself and as assignee of claims

Plaintiff-Appellant

v.

PRIME RETAIL, INCORPORATED; PRIME RETAIL, L.P.; PRIME RETAIL FINANCE, INCORPORATED; PRIME RETAIL FINANCE II, INCORPORATED; PRIME RETAIL FINANCE V, INCORPORATED; ARIZONA FACTORY SHOPS PARTNERSHIP; BEND FACTORY OUTLETS LIMITED PARTNERSHIP; BUCKEYE FACTORY SHOPS LIMITED PARTNERSHIP; CAROLINA FACTORY SHOPS LIMITED PARTNERSHIP; CASTLE ROCK FACTORY SHOPS PARTNERSHIP; CORAL ISLE FACTORY STORES LIMITED PARTNERSHIP; FLORIDA KEYS FACTORY SHOPS LIMITED PARTNERSHIP; GAINESVILLE FACTORY SHOPS LIMITED PARTNERSHIP; GROVE CITY FACTORY SHOPS PARTNERSHIP; GULF COAST FACTORY SHOPS LIMITED PARTNERSHIP; GULFPORT FACTORY SHOPS LIMITED PARTNERSHIP; HAGERSTOWN FACTORY SHOPS LIMITED PARTNERSHIP; HUNTLEY FACTORY SHOPS LIMITED PARTNERSHIP; INDIANAPOLIS FACTORY SHOPS LIMITED PARTNERSHIP; KANSAS CITY FACTORY OUTLETS LIMITED PARTNERSHIP; LATHAM FACTORY STORES LIMITED PARTNERSHIP; OUTLET VILLAGE OF LEBANON LIMITED PARTNERSHIP; LOVELAND

FACTORY SHOPS LIMITED PARTNERSHIP; MAGNOLIA BLUFF FACTORY SHOPS LIMITED PARTNERSHIP; MARKET STREET LIMITED; NEBRASKA CROSSING FACTORY SHOPS LIMITED PARTNERSHIP; NIAGARA INTERNATIONAL FACTORY OUTLETS LIMITED PARTNERSHIP; OAK CREEK FACTORY OUTLETS LIMITED PARTNERSHIP; OHIO FACTORY SHOPS PARTNERSHIP; OUTLET VILLAGE OF KITTERY LIMITED PARTNERSHIP; OXNARD FACTORY OUTLET PARTNERS; FACTORY OUTLETS AT POST FALLS LIMITED PARTNERSHIP; SAN MARCOS FACTORY STORES LIMITED; SHASTA OUTLET CENTER LIMITED PARTNERSHIP; TRIANGLE FACTORY STORES LIMITED PARTNERSHIP; HORIZON GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated; HORIZON GROUP PROPERTIES, INCORPORATED; HORIZON GROUP PROPERTIES, L.P.; FIRST HGI, INCORPORATED; SECOND HGI, INCORPORATED; THIRD HGI, L.L.C.; HGI PERRYVILLE, INCORPORATED, a/k/a Prime Outlets at Perryville Limited Partnership; HORIZON/GLEN OUTLET CENTERS LIMITED PARTNERSHIP, a/k/a Prime Retail, L.P.; FIRST HORIZON GROUP LIMITED PARTNERSHIP; SECOND HORIZON GROUP LIMITED PARTNERSHIP; THIRD HORIZON GROUP LIMITED PARTNERSHIP; H/G PERRYVILLE LIMITED PARTNERSHIP, a/k/a Prime Outlets at Perryville Limited Partnership; FINGER LAKES OUTLET CENTER, L.L.C.; HORIZON/GLEN GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated

Defendants-Appellees

NO. 01-1231
CA-00-2474-JFM

ACCRUED FINANCIAL SERVICES, INCORPORATED, for itself and as assignee of claims

Plaintiff-Appellant

v.

PRIME RETAIL, INCORPORATED; PRIME RETAIL, L.P.; PRIME RETAIL FINANCE, INCORPORATED; PRIME RETAIL FINANCE II, INCORPORATED; PRIME RETAIL FINANCE V, INCORPORATED; ARIZONA FACTORY SHOPS PARTNERSHIP; BEND FACTORY OUTLETS LIMITED PARTNERSHIP; BUCKEYE FACTORY SHOPS LIMITED PARTNERSHIP; CAROLINA FACTORY SHOPS LIMITED PARTNERSHIP; CASTLE ROCK FACTORY SHOPS PARTNERSHIP; CORAL ISLE FACTORY STORES LIMITED PARTNERSHIP; FLORIDA KEYS FACTORY SHOPS LIMITED PARTNERSHIP; GAINESVILLE FACTORY SHOPS LIMITED PARTNERSHIP; GROVE CITY FACTORY SHOPS PARTNERSHIP; GULF COAST FACTORY SHOPS LIMITED PARTNERSHIP; GULFPORT FACTORY SHOPS LIMITED PARTNERSHIP; HAGERSTOWN FACTORY SHOPS LIMITED PARTNERSHIP; HUNTLEY FACTORY SHOPS LIMITED PARTNERSHIP; INDIANAPOLIS FACTORY SHOPS LIMITED PARTNERSHIP; KANSAS CITY FACTORY OUTLETS LIMITED PARTNERSHIP; LATHAM FACTORY STORES LIMITED PARTNERSHIP; OUTLET VILLAGE OF LEBANON LIMITED PARTNERSHIP; LOVELAND FACTORY SHOPS LIMITED PARTNERSHIP; MAGNOLIA BLUFF FACTORY SHOPS LIMITED PARTNERSHIP; MARKET STREET LIMITED; NEBRASKA CROSSING FACTORY SHOPS LIMITED PARTNERSHIP; NIAGARA INTERNATIONAL FACTORY OUTLETS LIMITED PARTNERSHIP; OAK CREEK FACTORY OUTLETS LIMITED PARTNERSHIP; OHIO FACTORY SHOPS PARTNERSHIP; OUTLET VILLAGE OF KITTERY LIMITED PARTNERSHIP; OXNARD FACTORY OUTLET PARTNERS; FACTORY OUTLETS AT POST FALLS LIMITED PARTNERSHIP; SAN MARCOS FACTORY STORES LIMITED; SHASTA OUTLET CENTER LIMITED PARTNERSHIP; TRIANGLE FACTORY STORES LIMITED PARTNERSHIP; HORIZON GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated; HORIZON GROUP PROPERTIES, INCORPORATED; HORIZON GROUP PROPERTIES, L.P.; FIRST HGI, INCORPORATED; SECOND

HGI, INCORPORATED; THIRD HGI, L.L.C.; HGI PERRYVILLE, INCORPORATED, a/k/a Prime Outlets at Perryville Limited Partnership; HORIZON/GLEN OUTLET CENTERS LIMITED PARTNERSHIP, a/k/a Prime Retail, L.P.; FIRST HORIZON GROUP LIMITED PARTNERSHIP; SECOND HORIZON GROUP LIMITED PARTNERSHIP; THIRD HORIZON GROUP LIMITED PARTNERSHIP; H/G PERRYVILLE LIMITED PARTNERSHIP, a/k/a Prime Outlets at Perryville Limited Partnership; FINGER LAKES OUTLET CENTER, L.L.C.; HORIZON/GLEN GROUP, INCORPORATED, a/k/a Prime Retail, Incorporated

Defendants-Appellees

Appeal from the United States District Court for the District of Maryland at Baltimore

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

RECORD NO. 00 - 1971
And
RECORD NO. 01 - 1231

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ACCRUED FINANCIAL SERVICES, INC.,
Plaintiff-Appellant,
v.
PRIME RETAIL, INC., et al.,
Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ACCRUED FINANCIAL SERVICES, INC.'s PETITION FOR REHEARING AND FOR REHEARING *EN BANC* AND MOTION TO CERTIFY QUESTIONS OF STATE LAW TO THE MARYLAND COURT OF APPEALS

(Filed Aug. 12, 2002)

Rodney R. Patula, Esq.
Diane L. Gibson, Esq.
Squire, Sanders & Dempsey L.L.P.
One Maritime Plaza, Suite 300
San Francisco, California 94111
(415) 954-0200
Counsel for Appellant

Appellant Accrued Financial Services, Inc. ("AFS") respectfully requests panel rehearing or rehearing *en banc* of these consolidated appeals, pursuant to F.R.A.P. 35 and 40 and Circuit Rules 35 and 40. As an alternative to this Court's reconsideration of certain state law issues, AFS requests rehearing but moves, pursuant to Maryland Law & Judicial Code § 12-603, for an order certifying questions of Maryland law and public policy to the Maryland Court of Appeals.

STATEMENT OF PURPOSE

This case presents two questions of exceptional importance that merit rehearing by the panel or *en banc*. The first is whether the panel majority, in a published opinion and over a vigorous dissent, radically changed a well-recognized Restatement test governing conflicts of laws. The second question – one that the Court did not need to reach had it applied the applicable choice-of-law test – is whether the majority contravened well-established rules governing how a federal court is to determine the public policy of a State.

These questions are exceptionally important because the majority's decision jeopardizes the uniformity and challenges the soundness of other decisions of this Court and conflicts with the decisions of other jurisdictions, including Maryland, on the choice-of-law issue. Also, the decision violates principles of federalism and comity both by altering the long-standing choice-of-law analysis and by ruling that California law – which the parties selected to govern their contracts and under which law the contracts are valid – is trumped by a "public policy" of Maryland which the majority has declared, but Maryland has not.